Supreme Court, U.S.
FILED

No. 10-81 JUL 12 2010

OFFICE OF THE CLERK

# In The Supreme Court of the United States

JOE H. BRYANT, JR.,

*Petitioner,*

vs.

MILITARY DEPARTMENT OF THE STATE OF MISSISSIPPI; FRANKLIN E. CHALK; FREDERICK D. FEINSTEIN; ROY A. GRAHAM; BILLY JOE GRISSETT; DONALD E. JONES; LANGFORD L. KNIGHT; F. GREGORY MALTA; WILLIAM F. PARTEN; ROBERT E. PIERCE; ROGER E. SHIRLEY; CHARLES F. SPEED; AARON K. WILSON; THOMAS TEMPLE; JOHN DOES 1-20; and LESLIE WILKES,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the District Court and the Fifth Circuit improperly applied this Court's rulings in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); *Professional Real Estate Investors, Inc. v. Columbia Pictures*, 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993); and *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002), regarding the Petitioner's *First Amendment* right of Freedom of Speech, such that these courts' decisions are countervailing to decisions of other Circuits of the Courts of Appeal, thus creating a split among these appellate courts, and calling upon this Court to answer the question left undecided by *BE & K*, Appendix 26-27.

2. Whether the District Court and Fifth Circuit erred in dismissing claims against the Military Department of the State of Mississippi, through its arm of the Mississippi Air National Guard (hereinafter referred to as "MANG"), due to a misapplication of the *Feres* doctrine; and

3. Whether the District Court and Fifth Circuit erred in dismissing claims against the remaining individual Respondents for repeated and concerted acts of violence, reprisal, intimidation, and retaliation against the Petitioner.

## CERTIFICATE OF INTERESTED PARTIES

In accordance with Rule 14.1(b) of the *Supreme Court Rules*, Petitioner, Joe H. Bryant, Jr., would respectfully submit that the following parties have or may have a material and substantial interest in the outcome of this action before this Court:

1. Joe H. Bryant, Jr., Petitioner
2. Military Department of the State of Mississippi, Respondent
3. Franklin E. Chalk, Respondent
4. Frederick D. Feinstein, Respondent
5. Roy A. Graham, Respondent
6. Billy Joe Grissett, Respondent
7. Donald E. Jones, Respondent
8. Langford L. Knight, Respondent
9. F. Gregory Malta, Respondent
10. William F. Parten, Respondent
11. Robert E. Pierce, Respondent
12. Roger E. Shirley, Respondent
13. Charles F. Speed, Respondent
14. Aaron K. Wilson, Respondent
15. Thomas Temple, Respondent
16. Leslie Wilkes, Respondent

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## OPINIONS BELOW

The Fifth Circuit Court of Appeals published its opinion at *Bryant v. Military Department of Mississippi*, 597 F.3d 678 (5th Cir. 2010). The United States District Court of the Southern District of Mississippi published three opinions which are at issue in this Petition: *Bryant v. Military Department of Mississippi*, 381 F. Supp. 2d 586 (S.D. Miss. 2005); *Bryant v. Military Department of Mississippi*, 519 F. Supp. 2d 622 (S.D. Miss. 2007); and *Bryant v. Military Department of Mississippi*, 569 F. Supp. 2d 680 (S.D. Miss. 2008).

## JURISDICTIONAL STATEMENT

The Fifth Circuit entered its initial decision on February 17, 2010, and it entered its order denying Petitioner's Motion for Rehearing on April 12, 2010. This Court has jurisdiction to review the decision of the Fifth Circuit on a Writ of Certiorari, in accordance with 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due to the length of the provisions involved, this Petitioner provides the following citations, with the texts of such provisions contained in the Appendix,

in accordance with Rule 14.1(f) of the *Supreme Court Rules*:

> *Military Whistleblower Protection Act*, 10 U.S.C. § 1034
>
> First Amendment to the *United States Constitution*
>
> 42 U.S.C. § 1983
>
> 42 U.S.C. § 1985
>
> 42 U.S.C. § 1986

## STATEMENT OF THE CASE

Specifically, the controversy in this action concerns relief sought pursuant to the *Military Whistleblower Protection Act*, 10 U.S.C. § 1034, the *First Amendment* to the *United States Constitution*, and 42 U.S.C. §§ 1983, 1985 and 1986. Due to the decision of the Fifth Circuit Court of Appeals, a split now exists among the Circuit Courts of Appeals, which should be remedied by this Honorable Court.

Based upon the following arguments and legal precedent of this Court, the Petitioner would respectfully move this Court to reverse the appealed decisions of the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit, as set forth in those rulings.

On August 26, 2005, the District Court entered its Corrected Memorandum Opinion and Order, which dismissed all claims against Respondent "Military Department of the State of Mississippi, by and through the Mississippi Air National Guard," (the "Guard"), dismissed certain claims against some of the other Appellees, and denied the Guard's Fed. R. Civ. P. 11, 28 U.S.C. § 1927 and *Mississippi Code Annotated* Section 11-55-1, *et seq.* motion. *Bryant v. Military Department of Mississippi*, 381 F. Supp. 2d 586 (S.D. Miss. 2005)

On July 17, 2007, the District Court entered its Memorandum Opinion and Order and its (corrected) Memorandum Opinion and Order, which granted Partial Summary Judgment as to certain claims against the then-remaining Respondents. *Bryant v. Military Department of Mississippi*, 519 F. Supp. 2d 622 (S.D. Miss. 2007).

On June 17, 2008, the District Court then entered its Memorandum Opinion and Order, which granted Summary Judgment as to the last remaining claims against the vast majority of the Respondents. *Bryant v. Military Department of Mississippi*, 569 F. Supp. 2d 680 (S.D. Miss. 2008). That Order, when read in combination with the District Court's prior Order, left only certain claims pending against Respondents Malta and Pierce, but none against any other Respondents.

Appeal to the Fifth Circuit resulted in that Court's affirming of those decisions. *Bryant v.*

*Military Department of Mississippi*, 597 F.3d 678 (5th Cir. 2010).

## FACTS

Joe H. Bryant, Jr., has faithfully served the United States Air Force and is a combat hero, having put his life on the line for this nation in its conflict in Bosnia. He is, in fact, the only party in this civil action who has done so. Yet, where he saw malfeasance and corruption, he reported it, as is his duty, and for having performed his duty, he and his family have now suffered the reprisals of violence, threats, intimidation, vandalism, and character assassination, as even admitted by some of the Respondents.

Imperatively, this Court must note that while the history of this case has its genesis in the military, the facts developed below establish that the wrongful conduct of the Respondents carried over into extra-military wrongs. Thus, the indulgence of the Court is requested in reviewing this vital recitation of established facts.

At the heart of this case is Mr. Bryant's affirmative duty, as an officer in the United States Air Force and in his concurrent status with the Mississippi Air National Guard (MANG), to report misconduct of other members of the military to his superiors, regarding such misconduct at the 186th Refueling Wing of Key Field in Meridian, Mississippi.

Further, to not report even a reasonable suspicion of misconduct is itself misconduct. Bryant did his duty.

Likewise at the heart of this case lies the observation of this United States Supreme Court that a public employee, such as Bryant, does not relinquish his *First Amendment* rights, as he would enjoy as any citizen to speak on matters of public interest in connection with the operation of the Mississippi Air National Guard's Key Field, at Meridian. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731 (1968). As a private citizen, Bryant's rights of free speech on matters of public concern "are classic forms of speech that lie at the heart of the *First Amendment*." *Schneck v. Pro-Choice Network*, 519 U.S. 357, 377, 117 S. Ct. 855 (1997) (Chief Justice Rehnquist writing for the Court).

Hence, it is Bryant's performance of his duty as an officer and his exercise of his *First Amendment* rights to speak against the misconduct he and others witnessed that has wrought the fury of the Respondents to retaliate. What they did and how they did it are discussed below. Yet, the undeniable answer to the question of why they have attacked Bryant so is borne by the substantiated facts that, not one, but *two* investigations substantiated allegations of such misconduct against the Respondents in the performance of their requisite duties as members of the Mississippi Air National Guard. When his superiors did not first act on his reports, he brought public light to the issues and the investigations that verified such wrongdoing, all of which were considered in violation

of the *Mississippi Code of Military Justice*, Sections 33-13-1, *et seq.*, of the *Mississippi Code of 1972, Annotated*, as amended, as well as federal statutes, rules and regulations of the United States, the National Guard Bureau, and the Department of Defense.

Rather than receive a just commendation, Bryant has been attacked, sued, and threatened. Even the investigators for the Inspector General of the Air Force have cautioned Bryant that his life and the welfare of his family are in danger. Such danger existed despite provisions regarding protected communication, in accordance with 10 U.S.C. § 1034. Thus, at a time in our nation's history when preparedness and defense of our land was so vital, Bryant was left to fight for himself and his family against those he had exposed.

The Respondents clothe themselves as members of the state militia. Bryant is considered a threat to them, their military careers, their self-righteous honor, and even to Key Field itself. Thus, though they act in an extra-military manner, they nevertheless act under the color of state authority in perpetrating their retaliation against Bryant. Admittedly, they have conspired to "shut him up" with the formation of an "association" they call the "Concerned Guardsmen of Mississippi," so that a frivolous defamation lawsuit could be filed against Bryant; a lawsuit that has since been dismissed. *Chalk v. Bertholf*, 980 So. 2d 290 (Miss. App. 2007). They boldly admit that their purpose is to stop Bryant from talking anymore.

In addition to the defamation lawsuit, the Respondents, acting in concert, filed multiple objectively baseless lawsuits against Bryant, all of which have been dismissed.

Yet, more than baseless lawsuits have been visited upon Joe Bryant; he has been assaulted and threatened physically. Gun shots have barraged his home. He has been harassed by multiple telephone calls to his home. His airplane has been sabotaged. His wife's and son's vehicles have been vandalized. Scandalous and false letters have been written to his private employer, FedEx, to the Federal Aviation Administration (FAA) and to the Transportation Safety Administration (TSA), all in efforts to destroy his career and rob him of his family's livelihood. And, there is more.

In short, Joe Bryant did the right thing in exposing the wrongs he witnessed, and it is the right thing that he should have his day in Court.

## PUBLIC SPEECH

Despite the findings of malfeasance and corruption by the Inspector General of the Air Force with the command at Key Field, no real change occurred in the leadership of the 186th. Indeed, some of those same officers that are Respondents herein were left to rule the unit.

In May of 2003, Bryant brought these concerns to then Mississippi Governor Ronnie Musgrove. Bryant had already been interviewed by certain newspapers about the investigation of the 186th unit. He had been asked to appear on a radio station in Meridian, and Bryant advised the Governor of this request. On May 24, 2003, Bryant, along with the Inspector General's investigator, Colonel David Berholf, appeared on the radio show. None of the Respondents were mentioned by name, and none of the allegations of malfeasance and other military law violations were attributed to any particular Respondent. Yet, Bryant made his speech on this issue of public concern about the operations of the 186th at Key Field.

Incensed, the "Concerned Guardsmen of Mississippi" met again, and they determined to draft a lawsuit against Bryant for the stated purpose of getting him to "shut up." Indeed, in depositions, none of them can point to any specific damage they have suffered, as a result of Bryant being on the radio program; yet, it is solely based on this radio show that their lawsuit was based.

As in previous months, Bryant was continuously interviewed by *The Meridian Star* and the *Clarion-Ledger*, which are prominent newspapers in Meridian and Jackson, Mississippi, respectively. Some of the Respondents sued these newspapers, but their cases were dismissed. Further, one Respondent sued the United States Air Force, and that case was also dismissed. Yet, the pertinence to this action is the extent to which all of these Respondents are willing

to go, in order to punish one, such as Bryant, for having held them accountable in his public speech.

His statements in the media are disconcerting to them all, but no viable defamation claim exists for them, and as such, they are left to repeatedly file lawsuits against Bryant. Since Bryant would not "shut up," they have turned to other avenues of retaliation to either obtain his silence or damage him for such speech.

## MORE BASELESS LAWSUITS

It is not just the focal spurious defamation case the Respondents filed against Mr. Bryant, multiple lawsuits have been filed against him solely in an effort to "shut him up." Those suits include, but are not limited to, the following:

(a) *Malta v. Riverstates Publishing, et al.*; in the United States District Court for the Southern District of Mississippi; Civil Action No. 4:06CV11TSL;

(b) *Malta v. Bryant, et al.*, in the Circuit Court of Lauderdale County, Mississippi, Case No. 04CV262B;

(c) *Pierce v. Bryant,* in the United States District Court for the Southern District of Mississippi; Civil Action No. 4:06CV6TSL;

(d) *Wilson v. CNH Investments, et al.*, in the United States District Court for the Southern District of Mississippi; Civil Action No. 4:06CV12TSL;

(e) *Chalk v. Bryant*, in the United States District Court for the Southern District of Mississippi; Civil Action No. 4:06CV13TSL;

(f) *Wilkes v. Bryant*, in the Circuit Court of Lauderdale County, Mississippi, Case No. 05 CV 067;

(g) *Chalk, et al. v. Bryant*, in the Circuit Court of Lauderdale County, Mississippi, Case No. 03CV094CR; and

(h) *Temple v. Bryant*, in the Circuit Court of Lauderdale County, Mississippi, Case No. 04-CV-273B.

Mr. Bryant filed Motions to Stay the State Court Proceedings and to Consolidate all of the cases for, at least, discovery purposes in the case *sub judice*. After initially granting the Motions, due principally to the Respondents' failure to respond, the District Court reversed itself and denied the Motions. Thus, although he has brought this one suit against the Respondents for the claims and causes of action set forth herein, Mr. Bryant has endured defending against at least eight (8) different lawsuits, which are all meritless. *All of them have been dismissed with prejudice.*

## CONTINUOUS RETALIATORY CONDUCT

Indeed, one Respondent asserted that Petitioner Bryant was mentally deranged. He went so far as to send a letter to the FAA challenging Bryant's mental status for flight. As a result, a six-month investigation ensued, from which Bryant was eventually cleared.

Even more outrageous is the fact that in May of 2005, during the pendency of his lawsuit, Bryant's truck was broken into, while parked at a Holiday Inn in Memphis, where he was staying prior to his work flying for FedEx. Taken were his laptop computer and his files on this case. The entire break-in was caught on the security cameras of the hotel. Amazingly, during Bryant's deposition on January 11, 2005, in one of the ill-fated lawsuits against the United States Air Force, documents from Bryant's stolen computer were presented by opposing counsel. Those documents have now likewise been submitted by the Respondents in this case. Thus, Bryant brought a spoliation motion before the District Court to make an evidentiary inquiry into the stolen documents being presented and that a negative inference be presented to the jury. Erroneously, the District Court denied the motion, although finding a reasonable basis for Bryant's argument that the Respondents perpetrated the break-in.

Ultimately, neither the District Court nor the Fifth Circuit considered these actions as violations of the Petitioner's constitutional rights and privileges.

In making such a finding, the Fifth Circuit, in particular, has created a split among the Courts of Appeals concerning this Court's jurisprudence regarding such rights and privileges.

## SUMMARY OF THE ARGUMENT

### Standard of Review

Inasmuch as the District Court granted four separate dispositive motions, this Court may review such decisions under a *de novo* standard. *Hooks v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994); *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362, 365 (5th Cir. 1995). As noted above, Bryant has sought relief for violations of his rights protected by the *First Amendment* through various statutory and common law avenues. Each of those violations have been noted above, and the supporting law below establishes that he is entitled to relief.

The District Court and the Fifth Circuit denied Mr. Bryant this guaranteed relief. After four bites at the proverbial apple, the Respondents have avoided liability, thus far. Use of their "association" as the "Concerned Guardsmen" to repeatedly file multiple, patently frivolous lawsuits and engage in acts of violence against Bryant for the solely ***admitted*** purpose of "shutting him up" renders these Respondents liable. Misapplication of law mandates

reversal of the Courts' decisions, so as to resolve existing divisiveness among the Courts of Appeals.

## REASONS FOR GRANTING THE PETITION

### FIRST AMENDMENT

Joe Bryant's communication with his military superiors and his speech to media outlets on matters of public concern are protected under the *First Amendment* to the *United States Constitution*, as applied through the *Fourteenth Amendment*. These expressions therefore are in the nature of a public employee communicating in a military setting about misconduct, which is protected under the *Military Whistleblower Protection Act*, 10 U.S.C. § 34, ***and*** in the nature of a private citizen speaking on matters of public concern. *See also* 5 U.S.C. § 2302, *et seq.* Both settings are subject to protection under the *First Amendment*. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731 (1968), and *Schneck v. Pro-Choice Network*, 519 U.S. 357, 377, 117 S. Ct. 855 (1997), respectively. *See also, Connick v. Myers*, 461 U.S. 138, 140, 103 S. Ct. 1684 (1983).

Application of these fundamental principals is made through the *Fourteenth Amendment*, and through the Post Civil War Acts of 42 U.S.C. §§ 1983, 1985 and 1986.

*42 U.S.C. §§ 1983, 1985 and 1986*

> Every person who, under color of any statute, ordinance, regulation, *custom, or usage*, of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . . [Emphasis added.]

42 U.S.C. § 1983.

The only contrary argument offered by the Respondents, on whether they are liable, is simply that they have not acted "under color of state law." Yet, the facts and circumstances set forth above show that they have continuously justified their actions based on their status as military officers and members of the Mississippi Air National Guard's 186th Refueling Wing. They clothe themselves in their uniforms to evade liability under the *Feres* doctrine, but the analysis does not stop there, when, as here, the Respondents use their positions in the State militia and as the State militia to cause harm to Bryant in his personal and private citizen capacity.

In *Chappel v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983), this Court recognized this distinction. While the decision in *Chappel* barred a national guardsman from bringing such claims under the *Feres* doctrine, the case never touched upon conduct perpetrated by the individual defendants or the use of the national guard unit by such individual

defendants, as shown in this case, after Bryant had already been removed from the MANG and after he had even retired from military service. Here, the replete and specific factual allegations of the violence, threats and intimidation perpetrated by the individual and state perpetrators establish violations of Bryant's protected rights and privileges. As further recognized by the Third Circuit, the defendants' *personal involvement* in the alleged wrongs suffices for liability purposes. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3rd Cir. 1997) (further recognizing that actual knowledge and acquiescence is equated with personal direction).

The Fifth Circuit has previously wrestled with this same distinction in *Meister v. Texas Adjutant General's Department*, 233 F.3d 332, 340 (5th Cir. 2000), where they disagreed with the District Court's application of *United States v. Stanley*, 483 U.S. 669, 682-83, 107 S. Ct. 3054, 3063-64, 97 L. Ed. 2d 550 (1987); *Mindes v. Seaman*, 453 F.3d 197 (5th Cir. 1971), and in the District Court's decision in *Hassenfratz v. Garner*, 911 F. Supp. 235 (S.D. Miss. 1995). The bottom-line analysis, though, is whether the actions of the military officers and their resultant harm to the plaintiff had anything to do with "internal military decisions." Clearly, that is not the case here. The Respondents' reprisals against Bryant were for their own personal benefit. MANG's reprisals were for its own survival, due to the pervasive corruption then existing at Key Field. As noted above, the individual Repondents used the very

arm of MANG to wage war against Bryant for reporting and then making public the widespread corruption.

Clothed in their actions of acting "under color of any ... custom or usage of any State," the Respondents fall within the purview of the very conduct outlawed by 42 U.S.C. § 1983. This Court has recognized such liability where the actions of physicians, tangentially in government service, cause harm to their patients based on their own personal conduct and non-governmental physician-patient status, such that they acted "under color of state law." *See O'Connor v. Donaldson*, 422 U.S. 563 (1975) and *Estelle v. Gamble*, 429 U.S. 97 (1976).

These "Concerned Guardsmen of Mississippi" espouse the essence of the conduct prohibited by the statute. In one Respondent's deposition, he proclaimed their actions as "protecting themselves" and their unit [MANG], by engaging in the actions against Bryant. Another Respondent likewise stated that the purpose of the "Concerned Guardsmen of Mississippi" was to bring pressure on Bryant to halt the media attention and "shut him up."

**42 U.S.C. § 1985**

The actions and conduct of the Respondents constitute the purposeful prevention or hindering of Joe Bryant and the authorities of the State of Mississippi, the United States, or any other proper and appropriate constituted authority or agency, from the equal protection of the laws of the United States

of America. As a result thereof, they conspired to deprive or injure Bryant, in his person or property, by acts to deter, prevent, intimidate or threaten him, from discharging his duties as an officer in the MANG and the USAF, such that they conspired to and did violate the terms and provisions of 42 U.S.C. § 1985. These Respondents thus conspired for the purpose of impeding, hindering, obstructing, or defeating, in any manner, Bryant from engaging the due course of justice in the State of Mississippi and in the United States of America, with the intent to deny the equal protection of the laws, by use of such conspiracy to deter, force, intimidate or threaten Joe Bryant from freely, fully and truthfully discharging his duties, all in violation of 42 U.S.C. § 1985.

Their only argument in response to this charge is that Bryant is not a member of a protected class under 42 U.S.C. § 1985. Again, they miss the issue raised. This claim under Section 1985 is not based on discriminatory animus, though hostile animus certainly exists against Bryant. Instead, Bryant's claim is based upon the Respondents' concerted activities to prevent Bryant from discharging his duties.

This cause of action is specifically recognized by this Court in *Harrison v. Garrison*, 525 U.S. 121, 125, 119 S. Ct. 489, 492 (1998), in which the defendants in that case conspired to retaliate against a witness in federal court proceedings. The Court, applying 42 U.S.C. § 1985(2), found that the plaintiff had a cause

of action for the retaliation and intimidation visited upon the Petitioner.

Here, the same is true. This federal statute is designed to protect just such a person as Joe Bryant from the threats, harm, intimidation, harassment and reprisals directed at him. No class status is needed for such a claim under 42 U.S.C. § 1985(2).

Moreover, the conspiracy is readily admitted in the formation and participation in their "Concerned Guardsmen of Mississippi," which was strictly formed for the purposes of attacking Joe Bryant.

**42 U.S.C. § 1986**

Finally, the Respondents violated 42 U.S.C. § 1986, inasmuch as they failed or refused to prevent the commission of the aforesaid acts of violence, threats, intimidation, coercion, and harm, through the conspiracy.

This federal protective statute simply follows from Section 1985 for actions in failing to prevent such wrongs against Bryant from occurring. Based on this activity of conspiracy, through their "Concerned Guardsmen" organization, they are each separately liable under this Act for the harm and statutory damages assessed under the statute. Bryant is therefore entitled to the relief afforded him under 42 U.S.C. § 1988.

Bryant's claims are poignantly based upon Constitutional, statutory and regulatory law. He has

copiously invoked his rights and privileges under the *First Amendment* to the *United States Constitution*. Coupled with this constitutional protection are statutory, regulatory and public policy contained in the *Military Whistleblower Protection Act*, 10 U.S.C. § 34. Make no mistake, the point of Petitioner's claims under 10 U.S.C. § 1034 is not for a private cause of action under that statute; rather, Bryant contends his right to proceed with constitutional claims under the *First Amendment* and that his speech to the Inspector General is indeed "protected communication" under the military's own statutory and regulatory guidelines.

There is no military function, expertise or discretion involved in the willful acts of retribution and violence against Mr. Bryant. For example, no analysis of military function, expertise or discretion is involved with respect to the actions of the Respondent who wrote to the FAA in a conspicuous effort to have Petitioner's private pilot's license revoked. No military function, expertise, or discretion is involved in providing the FAA with falsified medical information concerning Mr. Bryant, in a specific effort to cause Bryant to lose his civilian job with FedEx.

## ERROR OF THE COURTS BELOW

At the heart of this case is the application of opinions of this Court in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d

277 (1983); *Professional Real Estate Investors, Inc. v. Columbia Pictures*, 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993); and *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002). Bryant would respectfully submit that the courts below incorrectly applied and interpreted these opinions to the case *sub judice*, in the following respects:

(A) *Bill Johnson's* does not apply to suits, such as those filed with an objective that is illegal under federal law;

(B) this *Bill Johnson's* exception was not affected by *BE & K*;

(C) such lawsuits that violate federal law are considered "illegal speech" and are thus not protected under the *First Amendment*;

(D) *BE & K* and no other federal case considering these aspects address a situation, such as the one at hand, in which there are some **nine (9)** cases filed strictly for retaliatory purposes;

(E) *BE & K* and no other federal decision concern the formation of an organization or association (such as the "Concerned Guardsmen of Mississippi"), which was established strictly for the purpose of bringing multiple lawsuits against Mr. Bryant, in order to "shut him up";

(F) the Respondents admittedly suffered no damages for which they sought relief in their cases, such that even if successful on the merits of liability,

no recovery could be made by even the most reasonable of complainants;

(G) the Respondents admittedly brought the lawsuits, not to recover money or to enjoin perceived unlawful conduct, but rather to only admittedly harass Bryant, such that clearly no reasonable complainant could believe that the cases were objectively well based;

(H) in four of the above referenced cases, Respondents simply filed the lawsuits, compelled Bryant to answer and file appropriate motions, never conducted discovery, and either had the cases dismissed for failure to prosecute or belatedly dismissed them voluntarily, such that even by their own standard the cases were not objectively based in fact or in law; and

(I) the burden of showing that the Respondents' multiple lawsuits were "objectively baseless" was incorrectly placed on Bryant.

The Respondents have not submitted any feasible challenge to Bryant's claims of his own protected speech under the *First Amendment*. Yet, their conduct of repeatedly bringing objectively baseless lawsuits is unlawful, and thus "illegal speech," is not protected by the *First Amendment*. Such specific federal prohibition against retaliation is grounded in the *Military Whistleblower Protection Act*, 10 U.S.C. § 1034. Further, additional specific federal prohibition is set forth under 42 U.S.C. §§ 1985 and 1986. Nowhere has this Court ruled that defendants avoid

these statutes by filing lawsuits against a person reporting on corruption and malfeasance at a military base.

This Court should therefore reverse the Fifth Circuit's ruling and allow Bryant's claims to proceed to trial against all of the adverse parties. Prior to this case, there existed no decisions from the Fifth Circuit involving interpretation of *BE & K*. Its decision therefore creates a split among the appellate courts for the District of Columbia,[1] the Ninth Circuit[2] and the Eleventh Circuit,[3] which are drastically different.

## SPLIT OF THE CIRCUITS

### Misapplication of *BE & K*

At the heart of the Fifth Circuit's decision is the misapplication of *Bill Johnson's*, in upholding the vacillating decisions of the District Court, which made the following ***initial*** objective finding regarding one of the multiple lawsuits filed against Bryant:

> Defendants' argument . . . would have this court assume that defendants' slander suit against Bryant was meritorious, ***or at least***

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[1] *Can-Am Plumbing v. NLRB*, 321 F.3d 145 (D.C. Cir. 2003).

[2] *Kearney v. Foley & Lardner*, 590 F.3d 638 (9th Cir. 2009).

[3] *NLRB v. USPS*, 526 F.3d 729 (11th Cir. 2008).

> ***that they had a reasonable basis for bringing the action.*** Yet, they merely declare that they "understandably were upset that Bryant made slanderous and disparaging statements about them," and argue that they could reasonably have thought they had a viable cause of action notwithstanding that Bryant did not identify them by name. . . . ***However, a party cannot succeed on a claim for slander merely because he was upset. . . .*** [Emphasis added.]

The District Court then went on to more thoroughly make just such a ruling based on the "objective baseless" standard, as is set forth in *BE & K*, although the District Court merely failed to cite the decision.[4] Most important and manifestly in error in the District Court's subsequent decision is the failure to consider the fact that ***no speech made in a lawsuit is protected, when the suit is filed in violation of federal law.*** The Fifth Circuit erroneously upheld this misapplication.

In *Bill Johnson's*, this Court ***conspicuously*** indicated that that case did not involve either (a) a case in which the claims are preempted by federal law or (b) ***a case that has an objective that is***

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[4] As further argued herein, the District Court's June 17, 2008 decision incorrectly placed the burden of showing that the Respondents' multiple cases were "objectively baseless" on Mr. Bryant; whereas, in the District Court's July 17, 2007 decision, the burden was correctly placed on the Respondents.

***illegal under federal law***. 461 U.S. at 737 n. 5, 103 S. Ct. at 2167 n. 5. *See also NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S. Ct. 373, 377, L. Ed. 2d 328 (1971). The Respondents ***admit*** that they filed all of the lawsuits (not just the slander suit) in retaliation against Bryant and in order to "shut him up." Such an admission violates the following federal law:

1. *Military Whistleblower Protection Act*, 10 U.S.C. § 1034.
2. the *First Amendment* of the *United States Constitution*.
3. 42 U.S.C. § 1985.
4. 42 U.S.C. § 1986.

In essence, according to *Bill Johnson's*, if the ***objective*** of the lawsuits is to violate federal law, then it is ***not*** protected. The manifest error of the decision of the courts below is that they did not consider the plain exemption expressed by this Court in *Bill Johnson's* and the plain fact that ***nothing*** in its decision in *BE & K* changes or otherwise affects this expressed exemption stated in *Bill Johnson's*.

This distinction was precisely noted by the Court of Appeals for the District of Columbia in *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir.

2003).[5] Just as lawsuits that are preempted by the *National Labor Relations Act* are not controlled by *Bill Johnson's*, so too are lawsuits that are ***filed with the objective of violating federal law***. Indeed, in both *Bill Johnson's* and in *Can-Am Plumbing*, it was conceded that such lawsuits fell under the expressed exception and thus outside the protection of the *First Amendment*. *See Can-Am*, 321 F.3d at 151. *BE & K* affected none of this exception.

Other reported cases from federal courts of appeals involving the interpretation of *BE & K* are *NLRB v. USPS*, 526 F.3d 729 (11th Cir. 2008) and *Kearney v. Foley & Lardner*, 590 F.3d 638 (9th Cir. 2009).[6] In *USPS*, no lawsuit was even filed. Instead, suit was merely threatened; yet, the Eleventh Circuit found such retaliatory conduct to be in violation of federal law. The court called such conduct "illegal speech." Such speech is therefore **not** protected by the *First Amendment*. *USPS*, 526 F.3d 736, *citing NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S. Ct. 1918, 1942 (1969). In *Kearney*, the Ninth Circuit found that discovery and spoliation violations by a school district and its counsel in an eminent domain

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[5] Nowhere in the District Court's decision of June 17, 2008, is this decision by the District of Columbia Circuit even addressed.

[6] The only other decision by a federal court of appeals citing *BE & K* is *Molski v. Evergreen Dynasty Corp.*, 521 F.3d 1215 (9th Cir. 2008); however, the citation is in the court's dissent, and the case strictly concerned pre-filing orders or injunctions, regarding multiple filings of frivolous lawsuits by a party.

proceeding did not shield them from liability in a subsequent lawsuit by the landowner, as being protected speech, and it found the "sham" exception applicable.

Additionally, a close reading of *Bill Johnson's*, *BE & K*, *Can-Am*, *Kearney* and *USPS* indicates that the burden of showing that the lawsuits were not "objectively baseless" fell on defendant. In instances when the employers are in a similar litigation position as the Respondents, they had the burden of such proof, not Mr. Bryant. Thus, this burden was erroneously placed on Bryant. Hence, manifest error exists.

The decisions in *Can-Am*, *Kearney* and *USPS* directly conflict with the decision made by the District Court and the Fifth Circuit. This Court should either vacate the decision and reverse for further proceedings not inconsistent with the above law.

## CONCLUSION

Based on the above and foregoing law and application of such law to the underlying facts, reversal of the District Court's and Fifth Circuit's decisions is mandated, so that a split among the Courts of Appeals be resolved. To not allow such remedial proceedings grants permission to persons and agencies falsely cloaking themselves in military

garb to wage a "counter offensive" against an honor-bound soldier who simply reported corruption and brought public scrutiny to those who refused to abide the law. Mr. Bryant is entitled to his day in court.

RESPECTFULLY SUBMITTED, this the 12th day of July, 2010.

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**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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No. 09-60182

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JOE H. BRYANT, JR.,

Plaintiff-Appellant-Cross-Appellee

v.

MILITARY DEPARTMENT OF THE STATE OF MISSISSIPPI,

Defendant-Appellee-Cross-Appellant

FRANKLIN E. CHALK; FREDERICK D. FEINSTEIN; ROY A. GRAHAM; BILLY JOE GRESSETT; DONALD E. JONES; LANGFORD L. KNIGHT; F. GREGORY MALTA; WILLIAM F. PARTEN; ROBERT E. PIERCE; ROGER E. SHIRLEY; CHARLES F. STEED; AARON K. WILSON; THOMAS TEMPLE; JOHN DOES 1-20; LESLIE WILKES,

Defendants-Appellees.

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Appeals from the United States District Court for the Southern District of Mississippi.

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(Filed Feb. 17, 2010)

Before JONES, Chief Judge, and GARZA and STEWART, Circuit Judges. EMILIO M. GARZA, Circuit Judge:

Col. (Ret.) Joe H. Bryant ("Bryant"), a former member of the Mississippi Air National Guard's ("MSANG") 186th Refueling Wing, sued MSANG and individual MSANG officials ("Individual Appellees"), asserting claims under: (1) the Military Whistleblower Protection Act, 10 U.S.C. § 1034; (2) the Mississippi Whistleblower Protection Act, MISS. CODE ANN. §§ 25-9-171-77; (3) 42 U.S.C. § 1983; (4) 42 U.S.C. § 1985; and (5) 42 U.S.C. § 1986. Bryant later amended his complaint to add various state law claims against individual MSANG officials. Through three separate orders the district court disposed of all claims against MSANG and the Individual Appellees in their official capacities and all of the federal law claims against the Individual Appellees in their individual capacities.[1] Bryant appeals these rulings. MSANG cross-appeals, alleging that the district court erred in denying MSANG's motion for sanctions. We affirm the district court's dismissal of Bryant's claims and, as to MSANG's cross-appeal, affirm the district court's denial of sanctions.

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[1] Bryant's claims against individual Appellee F. Gregory Malta in his individual capacity are still pending because Malta did not move for summary judgment. Bryant's state law claims against individual Appellee Robert E. Pierce also remain pending.

## I.

Over an eight-year period during his MSANG service, Bryant allegedly observed various acts of misconduct by MSANG officials. Bryant reported the alleged misconduct to superior officers and ultimately filed a complaint with the Inspector General of the Department of the Air Force. The Inspector General undertook two separate investigations, in which a number of Bryant's allegations of wrongdoing were substantiated. Bryant's charges and the ensuing investigation were the subject of regular media coverage in local newspapers and a talk radio show.

According to Bryant, MSANG and the Individual Appellees responded to Bryant's "whistleblowing" with a litany of retaliatory acts. These acts allegedly included employment-related actions such as attempts to force Bryant's resignation, career-damaging reports, and assignment to a position under a junior officer. Bryant also claims that MSANG officials committed acts of vandalism and violence, such as breaking into Bryant's vehicle, stealing his laptop, firing gun shots in and around his home, cutting the gasoline line to his wife's vehicle, harassing him with anonymous phone calls, and physically assaulting him. Several of the Individual Appellees also filed civil lawsuits against Bryant, which he contends were retaliatory and lacked merit. Based on these allegations Bryant asserted federal and state law claims against MSANG and the Individual Appellees.

In August 2005, the district court granted a motion to dismiss all claims against MSANG and the Individual Appellees in their official capacities. The district court dismissed all claims against MSANG because the Military Whistleblower Protection Act, 10 U.S.C. § 1034 does not create a cause of action, and insofar as MSANG is a state agency, all other claims are barred by the Eleventh Amendment. Additionally, the district court held that all employment-related claims against MSANG and the Individual Appellees in their official capacities are barred under *Feres v. United States,* 340 U.S. 135, (1950). In July 2007, the district court granted summary judgment in favor of the Individual Appellees in their individual capacities as to Bryant's Military Whistleblower Protection Act, Mississippi Whistleblower Protection Act, §§ 1983, 1985(2) and (3), and assault and battery claims. The court also disposed of some, but not all, of Bryant's claims under §§ 1985(1) and 1986. Finally, in July 2008, the district court granted summary judgment in favor of the Individual Appellees in their individual capacities as to Bryant's remaining §§ 1985(1) and 1986 claims. The district court entered a Rule 54(b) certification of final judgment as to those claims denied and parties dismissed by the orders of August 26, 2005, July 17, 2007, and July 17, 2008. Bryant thereafter brought the instant appeal in which he contends that the district court erroneously applied the *Feres* doctrine to dismiss the claims against MSANG and the Individual Appellees in their official capacities, incorrectly granted summary judgment in the July 2007 order, and misapplied First Amendment

law in determining that Bryant's § 1985(1) and § 1986 claims predicated on allegedly retaliatory litigation were barred.

## II.

This court reviews Rule 12(b)(1), 12(b)(6), and 12(c) dispositions *de novo*.[2] *See, e.g., Walch v. Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 293 (5th Cir. 2008); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). This court also reviews *de novo* a grant of Rule 56 summary judgment. The court affirms summary judgment if the record reveals no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Croft v. Governor of Texas*, 562 F.3d 735, 742 (5th Cir. 2009). When conducting its review, the court will evaluate the evidence in the light most favorable to the non-movant. *Breaux v. Halliburton Energy Servs.*, 562 F.3d 358, 364 (5th Cir. 2009).

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[2] MSANG styled its motion to dismiss, in which the Individual Appellees joined, as a "Rule 12(b)(1), 12(b)(6), 12(c), and Eleventh Amendment Motion to Dismiss and for Judgment on the Pleadings." The district court did not specify under which procedural mechanism(s) it was dismissing the claims, and Bryant did not specify which procedural grant(s) of dismissal he appeals, but regardless, the standard of review is the same.

## III

Bryant asserts that the district court erred in dismissing his claims against MSANG under the *Feres* doctrine. His brief, however, substantively discusses the *Feres* issue only in relation to his vandalism and violence claims against the Individual Appellees. The district court clearly held that *Feres* was not a ground for disposing of the vandalism claims and only applied *Feres* to Bryant's claims of employment-related retaliation against MSANG and the Individual Appellees. *Bryant v. Military Dep't of State of Miss.*, 381 F. Supp. 2d 586, 594 (S.D. Miss. 2005) ("*Bryant I*"). Accordingly, the limited *Feres* discussion in Bryant's brief centers around the wrong claims and the wrong parties. Bryant's failure to adequately brief the *Feres* issue is a waiver of these claims. *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001). Bryant did not preserve the issue merely by mentioning it in the "Statement of Issues." *See, e.g., Justiss Oil Co. v. Kerr-McGee Ref. Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996) (declining to address the merits of an issue raised only in the Statement of Issues and not argued in the body of the brief). Accordingly, we decline to address the propriety of the district court's dismissal under *Feres*.

Moreover, the decision below stands on independent grounds. The district court ruled that all of Bryant's claims against MSANG are barred by the Eleventh Amendment and that the §§ 1983, 1985, and 1986 claims are barred because MSANG is not a "person" under those statutes. Bryant failed to argue

that either of those determinations was incorrect. His failure to do so is fatal to his appeal of MSANG's dismissal from this litigation. *See, e.g., Berry v. Jefferson Parish,* 326 F. App'x. 748, 750 (5th Cir.2009) (unpublished) ("An unbriefed argument is an unpreserved argument."); *see also* FED. R. APP. P. 28(a)(9)(A).

## IV

Bryant next contends that the district court erroneously granted partial summary judgment in its July 2007 order. *See Bryant v. Miss. Military Dep't,* 519 F. Supp. 2d 622, 626 (S.D. Miss. 2007) ("*Bryant II*").[3] Bryant's appeal addresses only the district court's grant of summary judgment on his §§ 1983, 1985(1) and (2), and 1986 claims, and the state law assault and battery claims.[4] The district court ruled

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[3] The district court's order, referring to its previous dismissal of Bryant's Military Whistleblower Protection Act claims, reiterated that the statute does not authorize a private cause of action. *Bryant II,* 519 F. Supp. 2d at 626. The district court granted summary judgment on Bryant's claim under the Mississippi Whistleblower Protection Act because Bryant offered no response to the Individual Appellees' arguments that the Act applies only to actions by a state "agency," not coworkers; covers only acts that impact employment; and does not apply for actions after an employee is no longer employed. *Id.* at 626-27. Bryant raises no issue on appeal with respect to these rulings.

[4] Bryant spends some three pages of his brief discussing his claims of intentional and negligent infliction of mental distress, defamatory/false light liability and intentional interference with employment. It is unclear whether Bryant believes that these

(Continued on following page)

that Bryant could not succeed on any § 1983 First Amendment claim because he failed to show that the Individual Appellees acted "under color of state law." With respect to Bryant's §§ 1985 and 1986 claims, the district court ruled that any claims under §§ 1985(2) and (3) fail because Bryant could not demonstrate that the Individual Appellees were motived by "racial or some other type of invidious, class-based distinction." *Id.* at 628 (citations omitted). The district court further found that Bryant failed to create a genuine issue of material fact with respect to his § 1985(1) claim based on allegations of vandalism and violence. Finally, the district court dismissed Bryant's assault and battery claims as barred by the statute of limitations.

## A

A claim for violation of First Amendment rights must be brought pursuant to 42 U.S.C. § 1983. To state a claim under § 1983, a plaintiff must allege facts showing that a person, acting under color of state law, deprived the plaintiff of a right, privilege or immunity secured by the United States Constitution

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claims were dismissed. In any event, we need not address these claims because the district court has retained jurisdiction over them. *See Bryant II*, 519 F. Supp. 2d at 633-34 (noting that each of these claims is based on allegations regarding defendant Pierce's activities and concluding that issues of material fact precluded summary judgment as to the tort claims against Pierce).

or the laws of the United States. *Ellison v. De La Rosa,* 685 F.2d 959, 960 (5th Cir. 1982). A person acts "under color of state law" if he engages in the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . ." *Townsend v. Moya,* 291 F.3d 859, 861 (5th Cir. 2002) (quoting *United States v. Causey,* 185 F.3d 407, 415 (5th Cir. 1999)). However, a state officer does not act "under color of state law" if he "pursues personal objectives without using or misusing the power granted to him by the state to achieve the personal aim." *Id.* (quoting *Harris v. Rhodes,* 94 F.3d 196, 197 (5th Cir.1997)).

Bryant first argued that his lawsuit addressed actions taken by the Individual Appellees as "individuals, who just so happen to also be in the military but who act for no military purpose or reasons; rather, they act for their own hatred against the plaintiff." *Bryant II,* 519 F.Supp.2d at 628. Bryant further argued that the Individual Appellees' "actions occur[ed] off base, have no justifiable military purpose, [and] are perpetrated solely for personal reasons." *Id.* Recognizing that these allegations would doom his § 1983 claims, Bryant then contended that the Individual Appellees acted under color of state law because they "clothe[d] themselves as members of the state militia" and attempted to silence Bryant for their own personal benefit, namely to protect their military careers. *Id.* But the district court concluded that Bryant's allegations, *inter alia,* assault, vandalism, harassing phone calls, trying to get Bryant fired

from his civilian job, and firing gun shots near Bryant's home, even if undertaken to protect the Individual Appellees' military positions, "were not made possible by defendants' military positions and did not occur in the course of defendants' performing any of their military duties." *Id.*

Bryant has failed to point to specific facts showing there is a genuine issue whether the Individual Appellees acted under color of state law.[5] He makes only a conclusory assertion that these individuals wanted to protect their military careers. A motive to protect one's career is a personal motivation, not specific to individuals possessing state authority, and without more, namely, an act under color state law in the performance of actual or pretended duties or done with a pretense of official authority, is not sufficient. *See, e.g., Delcambre v. Delcambre,* 635 F.2d 407, 408 (5th Cir. 1981) (finding dismissal of a § 1983 claim proper where an altercation arose of out of a personal family and political dispute and the police officer did not use or threaten to use any state authority during the altercation); *see also Revene v. Charles County Comm'rs,* 882 F.2d 870 (4th Cir. 1989) ("[T]he nature of the act is controlling."); *Manning v. Jones,* 696 F. Supp. 1231, 1235 (S.D. Ind. 1988) (finding that not all acts of state

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[5] Indeed, as detailed above, Bryant's brief undercuts his own position by emphasizing that the Individual Appellees acted for their own "personal benefit" and characterizing their actions as an "extra-military matter." Appellant's Br. at 11, 35.

officials are under color of state law where motivation is personal and actor did not invoke or use any official authority). It does not follow from a desire to protect their military careers that any of these individuals' actions were achieved through the use or misuse of power granted by the state. Indeed, the allegations taken in the light most favorable to Bryant implicate no exercise of state power whatsoever. No reasonable jury could render a verdict in Bryant's favor based on allegations of motive alone, and accordingly, the district court properly granted summary judgment on Bryant's § 1983 claims. *See Reese v. Anderson,* 926 F.2d 494, 499 (5th Cir. 1991).

**B**

Bryant alleges that the Individual Appellees violated §§ 1985(1) and (2) and § 1986 by forming an association known as the "Concerned Guardsmen of Mississippi" to carry out acts of vandalism and violence and by filing retaliatory civil lawsuits against Bryant. The district court found that a § 1985(2) claim would not lie because the "equal protection" language of that section requires a showing that the conspiracy was motivated by class-based discriminatory animus and whistleblowers are not a protected class. *See Bryant II,* 519 F. Supp. 2d at 629. With respect to the § 1985(1) claims, Bryant's pleadings alleged specific instances of vandalism and violence, but the district court found that summary judgment nonetheless was warranted because Bryant failed to rebut the Individual Appellees' evidence that other

members of the community had a "strong motive to dislike" Bryant and therefore could have perpetrated the acts of vandalism and violence. *Id.* at 631.

Section 1985(1) prohibits conspiracies "to prevent, by force, intimidation, or threat" a federal officer from discharging his duties or to injure him because of his lawful discharge of his duties. 42 U.S.C. § 1985(1) (2009). Section 1985(2)[6] prohibits conspiracies to deny any citizen equal protection of the laws or to injure a citizen for his efforts to ensure the rights of others to equal protection. 42 U.S.C. § 1985(2) (2009). Section 1986 penalizes those with knowledge of and the power to prevent § 1985 conspiracies who fail to do so. 42 U.S.C. § 1986 (2009).

On appeal, Bryant contends that the Individual Appellees' actions were intended to prevent him from discharging his duties as an MSANG officer and to impede him from "engaging the due course of justice . . . with the intent to deny . . . the equal protection of the laws." Bryant argues, without citation to any authority, that "[n]o class status is need[ed] for such a claim under 42 U.S.C. § 1985(2)." We disagree. The "language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or . . . class-based,

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[6] The first clause of § 1985(2) prohibits conspiracies to deter witnesses from attending court or testifying, punish witnesses who have so attended or testified, or injure jurors. The district court found this subsection inapplicable to Bryant's claims, and Bryant does not appeal that finding.

invidiously discriminatory animus behind the conspirator's action." *See Griffin v. Breckenridge,* 403 U.S. 88, 102, (1971) (emphasis added) (referring to § 1985(3)). This Circuit has held that the class-based animus requirement of § 1985(3) applies equally to causes of action under the second clause of § 1985(2) such as Bryant's claims here. *Daigle v. Gulf State Utils. Co.,* 794 F.2d 974, 979 (5th Cir. 1986) (noting the parallel language in §§ 1985(2) and 1985(3) prohibiting certain conduct with an intent to deny "*equal protection* of the laws"). Moreover, we have previously rejected the argument that "whistleblowers" are a protected class for purposes of § 1985 claims. *See Garrie v. James L. Gray, Inc.,* 912 F.2d 808, 813 n.13 (5th Cir. 1990). Because Bryant's status as a whistleblower does not entitle him to protection under § 1985(2), the district court correctly dismissed the claim.

Bryant also appeals the district court's grant of summary judgment on his § 1985(1) claims predicated on vandalism and violence. A cause of action under § 1985(1) requires no allegation of racial or class-based discriminatory animus. *See Kush v. Rutledge,* 460 U.S. 719, 726, (1983). Accordingly, Bryant's "failure to identify any such animus is no impediment." *Bryant II,* 519 F. Supp. 2d at 629. Nonetheless, the district court properly concluded that Bryant's claim is barred because he failed to create a genuine issue of material fact whether the Individual Appellees committed the alleged acts. Bryant presented evidence that *someone* committed

acts of violence, vandalism and harassment. For instance, someone sent an anonymous greeting card to his home congratulating Bryant on having an illegitimate child. Someone also apparently mailed letters to Bryant's employer, FedEx, alleging among other things that Bryant smuggled machine guns on a FedEx plane. While Bryant succeeded in presenting evidence of violence, threats and intimidation, he presented no direct evidence that any of the Individual Appellees perpetrated these acts. Instead Bryant pointed to circumstantial evidence that his whistleblowing activities were *motive* for MSANG officials to commit retaliatory acts. But the Individual Appellees responded with evidence that other members of the community were angered by Bryant's activities and thus shared a similar motive. "Once the moving party has shown 'that there is an absence of evidence to support the non-moving party's cause,' the non-movant must come forward with 'specific facts' showing a genuine factual issues for trial." *Oliver v. Scott,* 276 F.3d 736, 744 (5th Cir. 2002). To survive summary judgment, Bryant was required to point to *specific facts* that would create a triable question whether the Individual Appellees, rather than someone else, committed the retaliatory acts. Bryant failed to do so. His only response to Individual Appellees' evidence of others' motive was that he believed that the Individual Appellees' motive was stronger. Bryant's belief is not evidence that creates a triable fact issue; therefore, summary judgment was proper.

## C

Bryant also appeals the district court's dismissal of his assault and battery claims against Individual Appellees, Thomas Temple and Leslie Wilkes. The alleged assault occurred, at the latest, on September 12, 2003.[7] Bryant did not file his suit until March 17, 2005. The district court found these claims time barred by Mississippi's one-year statute of limitations. Bryant tries to avoid the statute of limitations by arguing that the assault and battery were part of a pattern of ongoing and continuing threats, harassment, and intimidation. The Individual Appellees respond that assault and battery are not among the types of torts that can be classified as "continuing" and therefore are not exempted from the statute of limitations as "continuing torts."

The statute of limitations for assault actions under Mississippi law is one year. *See* MISS. CODE ANN. § 15-1-35 (2009) ("All actions for . . . assault and battery . . . shall be commenced within one (1) year next after the cause of such action accrued, and not after."). Under Mississippi law, the statute of limitations is tolled by the continuing tort doctrine where there is a repeated injury. *See McCorkle v. McCorkle*, 811 So. 2d 258, 264 (¶ 12) (Miss. Ct. App. 2001). "This

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[7] The record inconsistently reflects the date of the alleged assault and battery alternately as September 3, 2003 or September 12, 2003. Regardless of which date is correct, the statute of limitations would have run by the time Bryant filed suit on this tort claim.

principle applies, however, in situations where a defendant commits repeated acts of wrongful conduct, not where harm reverberates from a single, one-time act or omission." *Smith v. Sneed,* 638 So. 2d 1252, 1255 (Miss. 1994). A "continuing tort" is "one inflicted over a period of time, it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action." *Id.* at 1256.

Bryant's continuing tort theory fails. First, we find unavailing the argument that the allegations comprising Bryant's § 1985 claims can be combined with the single incident of assault and battery to constitute a "continuing tort." For one thing, a continuing tort is "*a* wrongful conduct that is repeated until desisted," not an amalgam of various wrongs. *Id.* (emphasis added). Second, while the district court opines that "the assault and battery is not itself a continuing tort," we need not decide whether under Mississippi law assault and battery may ever constitute a continuing tort.[8] An allegation of a single incident is plainly insufficient to meet the requirement that the wrongful conduct be repeated and that

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[8] The district court cites no authority that an assault and battery may not be a continuing tort and we have found no such authority under Mississippi law. However, some courts hold that assault and battery may be a continuing tort where, for instance, multiple incidents of assault and battery are perpetrated as in cases of abusive relationships. *See, e.g., Cusseaux v. Pickett,* 652 A.2d 789, 794 (N.J. 1994) (finding that each incident of battery and assault is not a separate, but a continuing tort where part of a pattern of abuse and violence).

the harm not "reverberate from one wrongful act of omission." *Id.* at 1255. The continuing tort doctrine does not apply and Bryant's assault and battery claim is barred.

## V

Finally, Bryant appeals the district court's grant of summary judgment in defendants' favor on his § 1985(1) claim based on allegations of retaliatory litigation. The allegedly "retaliatory litigation" includes a slander suit, two malicious prosecution suits, and an invasion of privacy suit filed by various Individual Appellees against Bryant. In their first motion for summary judgment, the Individual Appellees had argued that the allegedly retaliatory suits could not form the basis of a § 1985(1) claim. Citing *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731, (1983), they contended that summary judgment was proper because "the filing of a meritorious suit is not an actionable act of retaliation." They maintained that because their suits had a reasonable basis in fact and law they could not be held liable for retaliation. In its July 2007 order the district court denied the motion, explaining that it could not simply assume a reasonable basis for bringing the allegedly retaliatory lawsuits. *Bryant II,* 519 F. Supp. 2d at 632. But in its June 2008 order the district court reconsidered the issue and reached the opposite conclusion after applying *BE & K Constr. Co. v. NLRB,* 536 U.S. 516, (2002). The district court found that Bryant's § 1985(1) claim for retaliatory litigation was barred

by the Individual Appellees' First Amendment right of access to the courts. It reasoned that *Bill Johnson's* required the defendants to show that their lawsuits were meritorious, which they failed to do, while *BE & K* required that Bryant show that defendants' lawsuits were "objectively baseless." Applying *BE & K*, the district court granted summary judgment, concluding that Bryant did not show that the litigation was "objectively baseless." *Bryant v. Miss. Military Dep't*, 569 F. Supp. 2d 680, 682 (S.D. Miss. 2008) ("*Bryant III*").

The First Amendment of the federal Constitution guarantees the right of access to the courts to petition for redress of grievances. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, (1972). We have found no case addressing the intersection of the right to petition with § 1985(1)'s prohibition on conspiracies to interfere with a federal officer's discharge of his duties. Because the contours of First Amendment petitioning jurisprudence have been largely fleshed out in the antitrust and labor context, we turn to these cases. The *Noerr-Pennington* doctrine holds that the right to petition the government for redress is generally immune from antitrust liability unless the petitioning activity is a "sham." *See United Mine Workers v. Pennington*, 381 U.S. 657, (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, (1961). "Baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's*, 461 U.S. at 743. But determining what litigation is "sham" or "baseless"

requires the drawing of a "difficult line" to separate objectively reasonable claims from a "pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused." *Cal. Motor Transp.*, 404 U.S. at 513. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries,* the Supreme Court held that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." 508 U.S. 49, 57, (1993). The Supreme Court enunciated a two-part test for sham litigation: (1) "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and (2) "only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation" to determine "whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor,' through the 'use [of] the governmental *process* as opposed to the *outcome.*'" *Id.* at 60-61 (emphasis in original) (citations omitted). The plaintiff bears the burden to disprove the challenged lawsuit's legal viability before subjective intent can be considered. *Id.* This test looks at objective merit at the outset, not whether the claim ultimately prevailed. *Id.* at 61 n.5.

The Supreme Court has drawn the contours of the First Amendment petition right somewhat differently in the labor law context. In *Bill Johnson's,* the case on which the district court's July 2007 denial of summary judgment was based, the NLRB enjoined

an employer from suing picketing employees for defamation on the ground that the employer's suit constituted a retaliatory and unfair labor practice in violation of the National Labor Relations Act. *Bill Johnson's,* 461 U.S. at 733-35. *Bill Johnson's* developed two tests for merit, depending on the stage of the litigation at which the merit of the case is assessed. As to whether the NLRB could enjoin an ongoing suit, the Court adopted the test for summary judgment, *i.e.* whether the lawsuit presents "a genuine issue of material fact." If so, as in the case of Bill Johnson's suit against the picketing employees, then the suit could not be enjoined. *Id.* at 744-45 & n.11. In dicta, the Court spelled out a second test to be applied once the underlying litigation is completed.

> If the employer's case . . . ultimately proves meritorious and he has judgment against the employees, the employer should prevail . . . because the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice. If judgment goes against the employer . . . or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation.

*Id.* at 747. In a departure from the *Professional Real Estate Investor's* "objectively baseless" test, *Bill Johnson's* equated "meritorious" suits with winning and "unmeritorious" with suits that did not prevail. *See id.* Thus, two different standards defining the contours of First Amendment protection for petitioning activity exist: under *Professional Real Estate Investors* the litigation must be found "objectively baseless" before subjective intent is considered, while under *Bill Johnson's,* a reviewing court must simply look to whether the litigant won or lost the suit to determine whether it was "meritorious."

The Supreme Court's grant of certiorari in *BE & K* poised the Court to clarify whether the "objectively baseless" or win-lose test should be the standard for determining what petitioning activity is and is not protected by the First Amendment. The Court was to determine whether the NLRB under *Bill Johnson's* win-lose test could penalize employers who, for a retaliatory purpose, filed but lost objectively reasonable suits. *See BE & K Constr. Co.,* 536 U.S. 516. But the Supreme Court did not ultimately answer that question. Rather, it issued a narrow holding that the NLRB incorrectly interpreted the NLRA in order to punish suits as "retaliatory" even though they may have been filed for a legitimate purpose. *Id.* at 536. The Court issued this narrow holding rather than address the constitutional question because it determined that the petitioning activity at issue was the "class of reasonably based but unsuccessful lawsuits." *See id.* at 531. Because the suits were "reasonably

based," the Court could limit its consideration to the extent to which the NLRB could penalize such suits under the NLRA which prohibits "interfering, restraining, or coercing" employees in the exercise of rights guaranteed in [the NLRA]. *Id.* at 536. Here, there is no pending cause of action under the NLRA. Thus, *BE & K* does not answer the question of which test, *Professional Real Estate Investors* or *Bill Johnson's,* should be applied in the first instance. Nor does *BE & K* decide whether a litigant may be liable for bringing an "unsuccessful but reasonably based suit[ ] that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for . . . protected activity." *Id.* at 537.

Accordingly, we find the narrow holding of *BE & K* inapposite to the issues raised in this case. Rather, the standard to be applied to the allegedly retaliatory litigation is the *Professional Real Estate Investors* test, requiring a finding that the petitioning activity is "objectively baseless," before subjective intent is considered.[9] This test, rather than *Bill Johnson's,* has been extended outside the area of antitrust to other contexts and we find it appropriate here.

Bryant contends that the district court incorrectly placed the burden to show the suits were objectively

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[9] Although the district court cited to *BE & K Construction,* which we find inapplicable, it actually applied the "objectively baseless" standard of *Professional Real Estate Investors.*

baseless on him. The burden to show that a suit is objectively baseless is on the plaintiff who seeks to show that the suit is not deserving of First Amendment protection. *See Prof'l Real Estate Investors,* 508 U.S. at 60-61. Here, the Individual Appellees moved for summary judgment, and thus were required to offer evidence that the lawsuits they filed were not "objectively baseless," that is, not a lawsuit in which "no reasonable litigant could realistically expect success on the merits." *Id.* at 49. Once they made that showing, the burden was properly on Bryant as the non-moving party to offer evidence showing a genuine issue of material fact as to whether the lawsuits were "objectively baseless." As discussed below, the district court correctly found that Bryant did not meet this burden.

One of the Individual Appellee's lawsuits alleged slander, intentional infliction of emotional distress, and falsehoods/trade libel based on comments that Bryant made in a radio talk show and various newspaper and other publications about the leadership of the MSANG unit. To show that the lawsuit was not "objectively baseless," the Individual Appellees pointed to evidence that Bryant had engaged in a media campaign in which he leaked to the media a copy of an Inspector General's report substantiating some of Bryant's allegations against various MSANG officials, commented in a series of newspaper stories about his allegations, and appeared on a radio talk show in which he said that the MSANG leadership was "corrupt," "had blood on their hands," and "ran

the unit like the mafia." Bryant contended that the lawsuit was "objectively baseless" because he had not named names on the radio talk show. But this is insufficient.

Under Mississippi law, slander requires proof of: (1) a false statement that has the capacity to injure the plaintiff's reputation; (2) an unprivileged publication, i.e., communication to a third party; (3) negligence or greater fault on the part of the publisher; and (4) either actionability irrespective of special harm or existence of special harm caused by publication. *Speed v. Scott,* 787 So. 2d 626, 631 (¶ 21) (Miss. 2001). In responding to the Individual Appellees' first summary judgment motion, Bryant claimed that his statements were absolutely true and the district court declined to grant summary judgment because defendants offered no evidence that they were false. It appears that to the extent the slander lawsuit was based on statements about any of the allegations that were substantiated in the Inspector General's report, there could be no reasonable expectation of proving falsity. But comments to the effect that the leadership was "corrupt," "had blood on their hands," and "ran the unit like the mafia" are subjective, and the question of falsity is a closer one such that a reasonable litigant might realistically expect to prove falsity. Moreover, even though Bryant had not named names, there was ample public information as a result of the leaked Inspector General's report and other media stories such that Bryant's comments

about the "leadership" could be understood to refer to the individuals who filed suit against him.

Individual Appellees also argued that two separate malicious prosecution suits filed against Bryant were not "objectively baseless." Bryant filed criminal assault claims against Individual Appellees Temple and Wilkes that were dismissed after Bryant's presentation of evidence. Temple and Wilkes then each filed malicious prosecution suits against Bryant. Bryant failed to offer any evidence that these suits were objectively baseless at their inception, nor can we say that they were on the record before us. Under Mississippi law, a malicious prosecution claim requires that the plaintiff prove: (1) the institution of civil or criminal proceedings by the defendant; (2) termination of the proceedings in the plaintiff's favor; (3) malice in instituting the proceedings; (4) want of probable cause; and (5) damages. *See Trilogy Commc'ns, Inc. v. Times Fiber Commc'ns, Inc.*, 47 F. Supp. 2d 774, 778 (S.D. Miss. 1998); *see also Moon v. Condere Corp.*, 690 So. 2d 1191, 1194 (Miss. 1997). A reasonable litigant could expect to be able to show "want of probable cause" based on the court's dismissal of Bryant's assault claims without considering anything other than Bryant's evidence and argument. Similarly, a reasonable litigant might expect to succeed in showing "malice" by pointing to Bryant's media campaign against the MSANG leadership and well-documented comments that he was "after" them.

The same is true of the various invasion of privacy lawsuits that some Individual Appellees filed

against Bryant based on Bryant's leak of the Inspector General's confidential report to local newspapers. Mississippi recognizes a right of action for invasion of privacy based on public disclosure of private facts. *See Young v. Jackson,* 572 So. 2d 378, 381-82 (Miss. 1990). The Inspector General's report was confidential and protected by the Privacy Act; Bryant was told not to disclose its contents. But Bryant gave a copy of the report to two newspapers that then publicized the information. A reasonable litigant could realistically expect to prevail on these facts. Moreover, Bryant again failed to offer any evidence that these suits were objectively baseless, other than to argue that they were not prosecuted or were dismissed. But this argument puts the cart before the horse. The Supreme Court has made clear that we are to test the objective merit at the outset, not whether the claim ultimately prevailed. *Prof'l Real Estate Investors,* 508 U.S. at 61 n.5. Because we cannot say that any of these lawsuits were objectively baseless when initiated, we will not consider the defendants' subjective intent in filing the lawsuits. *See id.* at 60-61.

Nonetheless, Bryant vehemently argues that we must consider evidence that the sole purpose in filing these lawsuits was to silence his complaints of wrongdoing and misdeeds committed by the MSANG officials. While we have determined that these lawsuits, all of which were unsuccessful, were not objectively baseless, the Supreme Court has left open the question whether an "unsuccessful but reasonably based

suit . . . that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome" might not be protected by the First Amendment. *BE & K*, 536 U.S. at 537. At this juncture, such petitioning activity is protected under *Professional Real Estate Investors* and *BE & K*. We cannot say whether the Supreme Court will, at some future point, determine otherwise. We have previously declined to create a "retaliatory intent" exception and we reaffirm that view today. *See Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 862 (5th Cir. 2000) (declining to create an exception to First Amendment protection for petitioning activity that is not objectively baseless, but undertaken with a "retaliatory intent").

Finally, Bryant contends that we should find the Individual Appellees' various lawsuits outside the bounds of First Amendment protection because they are "illegal" in that they violate the proscription against retaliation found in the Military Whistleblower Act and 42 U.S.C. §§ 1985(1) and 1986. Bryant also argues that the "objectively baseless" standard ought to be applied in some different, and presumably favorable way in this case because multiple lawsuits were filed against him. But Bryant made neither of these arguments before the district court and because he failed to do so, we will not consider them now. *See Pluet v. Frasier*, 355 F.3d 381, 384-85 (5th Cir. 2004). Because Bryant did not carry his burden to show that the allegedly retaliatory litigation was objectively

baseless at the outset, without consideration of subjective intent, we affirm the district court's grant of summary judgment as to Bryant's § 1985(1) retaliatory litigation claims.

## VI

MSANG cross-appeals the district court's denial of its motion for sanctions under Rule 11, 28 U.S.C. § 1927 and the Mississippi Litigation Accountability Act, MISS. CODE ANN. § 11-55-1 *et seq.* The district court denied the motion for sanctions in a footnote, stating that it was "not persuaded that Bryant's complaint against MSANG was frivolous." *Bryant I,* 381 F. Supp. 2d at 594 n.12.

This court reviews a district court's denial of sanctions for abuse of discretion. *Test Masters Educ. Servs., Inc. v. Singh,* 428 F.3d 559, 582 (5th Cir. 2005). We usually require at least a brief statement of reasons in order to conduct a meaningful review. *See, e.g., Copeland v. Wasserstein, Perella & Co.,* 278 F.3d 472, 484 (5th Cir. 2002); *Schwarz v. Folloder,* 767 F.2d 125, 133-34 (5th Cir. 1985). Although the district court did not articulate any specific reasons for its decision, we nonetheless find no abuse of discretion. Sanctions under 28 U.S.C. § 1927 are punitive in nature and require "clear and convincing evidence, that *every facet* of the litigation was patently meritless" and "evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court" *Procter & Gamble Co. v. Amway Corp.,* 280 F.3d 519,

525-26 (5th Cir. 2002) (emphasis in original). Such sanctions may only be awarded if a party "multiplies the proceedings . . . unreasonably and vexatiously," a standard that focuses on the conduct of the litigation and not on the merits. *See Religious Tech. Ctr. v. Liebreich,* 98 F. App'x. 979, 983 (5th Cir. 2004) (unpublished). In our review of the record, we see nothing to suggest – let alone clear and convincing evidence – that sanctions would be appropriate under this standard. And, while Rule 11 has a lower standard of culpability than § 1927, "an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court." *Bergquist v. FyBX Corp.,* 108 F. App'x. 903, 904 (5th Cir. 2004) (unpublished) (affirming denial of Rule 11 sanctions on the view that there was no "improper purpose" underlying the complaint). This case, despite Bryant's losing, is not totally meritless and we see no evidence of an improper purpose.

Accordingly, we affirm the district court's denial of sanctions.

## VII

For the foregoing reasons, we AFFIRM the district court's dismissal of all claims against MSANG and the Individual Appellees in their official capacities and its two separate grants of summary judgment in the Individual Appellees' favor. On cross-appeal, we AFFIRM the district court's sanctions decision.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOE H. BRYANT — PLAINTIFF

VS. — CIVIL ACTION NO. 3:05CV179TSL-JCS

MISSISSIPPI MILITARY DEPARTMENT, ET AL. — DEFENDANTS

MEMORANDUM OPINION AND ORDER

With leave of court, defendants have filed and there is now pending before the court for consideration a second motion for summary judgment filed by defendants Franklin E. Chalk, Frederick D. Feinstein, Roy A. Graham, Billy Joe Gressett, Donald E. Jones, Langford L. Knight, William F. Parten, Robert E. Pierce, Roger E. Shirley, Charles F. Steed, Aaron K. Wilson and Thomas Temple. Plaintiff Joe H. Bryant has responded to the motion and the court, having considered the memoranda of authorities submitted by the parties, along with other pertinent authorities, concludes that the motion should be granted.

Plaintiff filed this action alleging claims under federal and state law based on allegations that defendants engaged in conduct amounting to threats, intimidation and violence against him in retaliation for his having made allegations of misconduct by

members (including defendants) of the 186th Refueling Wing of the Mississippi Air National Guard.[1] Previously in this cause, all defendants (other than Greg Malta) moved collectively for summary judgment on all plaintiff's claims, including his claim or claims based on allegations that defendants retaliated against him for his whistleblowing activities by, among other things, initiating frivolous litigation against him. At the time of that motion, defendants were under the impression that this claim related solely to a June 3, 2003 slander suit they had filed against Bryant in state court based on comments he had made during a radio talk show.[2] They argued that

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[1] Plaintiff had undertaken to assert these claims under the Military Whistleblower Act, the Mississippi Whistleblower Act, 42 U.S.C. § 1983, or 42 U.S.C. § 1985, and 42 U.S.C. § 1986. This court held in its opinion on defendants' prior summary judgment motion that as a matter of law, plaintiff's retaliation claim was only cognizable, and then only if factually sustainable, under § 1986 and § 1985(1), which prohibits conspiracies to interfere with a federal officer in the performance of his duties or to injure him on account of his lawful discharge of the duties of his office. The remaining claims were dismissed. *See Bryant v. Mississippi Military Dept., et al.,* No. 3:05CV179TSL-JCS (S.D. Miss. July 17, 2007).

[2] In fact, plaintiff has since clarified that his claim is based not just on "the focal spurious defamation case the Defendants, and all of them filed against the Plaintiff," but on "multiple lawsuits" defendants have filed against him "solely in an effort to 'shut him up.'" These include the following: *Pierce v. Bryant,* No. 4:06CV6TSL (S.D. Miss.); *Malta v. Riverstates Pub. et al*; No. 4:06CV11TSL (S.D. Miss.); *Wilson v. CNH Investments,* No. 4:06CV12 TSL (S.D. Miss.); *Chalk v. Bryant,* No. 4:06VC13TSL (S.D. Miss.); *Wilkes v. Bryant,* Case No. 05CV067 (Cir. Ct. Lauderdale Cty., MS); *Temple v. Bryant,* Case No. 04CV273B

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under the reasoning of *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983), a case decided in the context of what they contended was "the analogous situation under the National Labor Relations Act, 29 U.S.C. § 141, *et seq.*, which has a retaliation provision," they could not be held liable for retaliation if they had a reasonable factual basis for the suit. Citing *Bill Johnson's Restaurants,* defendants claimed they were entitled to summary judgment because, even assuming they had a retaliatory motive for filing that slander lawsuits) against Bryant, "the filing of a meritorious suit is not an actionable act of retaliation."[3] They maintained

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(Cir. Ct. Lauderdale Cty, MS); and *Malta v. Bryant,* Case No. 04CV262B (Cir. Ct. Lauderdale Cty., MS). Although not previously addressed in connection with this claim, these additional lawsuits are considered herein.

[3] The slander suit was based on comments by Bryant during a May 2003 radio talk show, in which he stated the following:

> There are some disgusting officers . . . in leadership positions. There's about 10 to 12 more people that need to be admonished. [T]here's more [than] 60 or 100 charges against . . . 10 to 15 people [yet to come] . . . [T]he entire leadership structure is corrupt. I'm after the chief NCOs and the lieutenant colonels and above that have got blood on their hands in this action. All I want is leadership change. I'm not going to stop until we've had a leadership change . . . I'm going to be relentless . . . General Lipscomb and General Cross . . . [are] examples of failed leadership. We have allowed a mafia-type system to grow in the leadership.

Following these comments, defendants, other than Wilkes and Temple, filed suit in state court for slander based on Bryant's

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that since they had "a reasonable basis (in fact and in law) to file the (slander) suit," they could not be held liable for retaliation. This court denied defendants' motion for summary judgment, explaining it could not simply assume that defendants had a reasonable basis for bringing the action. *See Bryant v. Miss. Military Dept.*, Civil Action No. 3:05CV179TSL – JCS, at 20 (S.D. Miss. July 17, 2007).[4]

Defendants have now filed a second motion for summary judgment, arguing that the applicable analysis is not that which is set forth in *Bill Johnson's Restaurants v. NLRB*, which would require

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statements. In their complaint, defendants did not identify his specific comments, but merely recited:

> Statements made and published by the Defendants as described herein above slander the good name and reputation of each of the Plaintiffs, expressly or impliedly, causing injury to the said Plaintiffs for which each should be permitted to recover.

The Circuit Court found the allegations insufficiently specific, and gave defendants an opportunity to amend to include more specificity as to which statements they alleged to be slanderous, information as to how the statements were slanderous and to whom the statements were directed. However, when they failed to timely amend their complaint, the court dismissed the case; the Mississippi Court of Appeals affirmed that decision. *See Chalk v. Bertholf*, 980 So. 2d 290, 293 (Miss. Ct. App. 2007).

[4] Contrary to plaintiff's claimed understanding, this court did not "determine[ ] that there was objectively no reasonable basis for the unsuccessful, baseless and retaliatory motivated slander suit these Defendants filed against the Plaintiff." The court held only that it could not assume there *was* a reasonable basis for the suit.

defendants to show that their lawsuits were meritorious, but rather, that enunciated in *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002), under which the plaintiff, to succeed on his claim, would have to show that defendants' lawsuits against him were not "objectively baseless." Having further considered the issue, the court is of the opinion that the "objectively baseless" standard is applicable; the court is further of the opinion that plaintiff has not shown (nor for that matter undertaken to show) that defendants' lawsuits were objectively baseless. Therefore, the court will vacate its earlier opinion on the issue and enter summary judgment for defendants.

Plaintiff has claimed in this action that defendants' slander lawsuit, and a number of other lawsuits filed against him by individual defendants,[5] were filed in retaliation for his whistleblowing activities. Defendants' motion is grounded on the principle that the First Amendment protects an individual's right of access to the courts. The right to petition the government contained in the First Amendment protects the right of plaintiffs to file certain suits. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525, 122 S. Ct. 2390, 2396, 153 L. Ed. 2d 499 (2002); *Cal. Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972). Defendants recognize that this right is not absolute, and

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[5] *See supra* note 2.

that the Supreme Court has held in labor and antitrust contexts that "sham" suits can lead to civil liability if those suits "were both objectively baseless *and* subjectively motivated by an unlawful purpose." *BE&K Constr. Co.*, 536 U.S. at 531, 122 S. Ct. at 2399 (citing *Bill Johnson's Rests., Inc., v. NLRB,* 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983), and *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,* 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)). *See also Dixon v. International Broth. of Police Officers,* 504 F.3d 73, 86 (1st Cir. 2007). Defendants argue, correctly in the court's view, that there is no reason these same principles would not also apply in the present context, where plaintiff seeks to hold defendants liable for exercising their First Amendment right to initiate litigation. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006) ("[W]e conclude that the *Noerr-Pennington* doctrine[6] stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause.") (citing *White v. Lee,* 227 F.3d 1214, 1231

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[6] The *Noerr-Pennington* doctrine, which has its origins in two U.S. Supreme Court cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) and *United Mine Workers of America v. Pennington,* 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), is grounded in the First Amendment right to petition the government and provides that parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent.

(9th Cir. 2000) (holding, before *BE & K*, that because it "is based on and implements the First Amendment right to petition," the *Noerr-Pennington* doctrine is not limited to the antitrust context, but "applies equally in all contexts"); *Zemenco, Inc. v. Developers Diversified Realty Corp.*, No. Civ. A. 03-175, 2005 WL 2545303, at 9 (W.D. Pa. Oct. 7, 2005) (noting that prior Third Circuit precedent gave no indication that "this principle of First Amendment immunity was not meant to have general applicability. . . .") (citing *Barnes Foundation v. Township of Lower Merion*, 242 F.3d 151, 160 (3d Cir. 2001). Defendants further submit that since plaintiff has not and cannot show that defendants' slander lawsuit, or any of the other cases brought by one or more of them, was "objectively baseless," then plaintiff cannot prevail on his claim against them.

To lose the protection afforded by the First Amendment, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59, 113 S. Ct. 1920, 1928, 123 L. Ed. 2d 611 (1993). "If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome," the suit is immunized and plaintiff's retaliation claim cannot succeed. *See, id. See also A Fisherman's Best, Inc. v. Recreational Fishing Alliance*, 310 F.3d 183, 191 (4th Cr. 2002) ("The existence of probable cause to institute legal or administrative action precludes a finding that an

antitrust defendant has engaged in sham litigation. The necessary probable cause requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.") (citing *Prof'l Real Estate Investors*).

In short, defendants had a right to file their lawsuits, (even if their motive was retaliatory) and their suits are protected by the First Amendment, regardless of whether they were successful on the merits, unless plaintiff shows that their lawsuits were objectively baseless. And here, plaintiff has not shown that any litigation brought against him by defendants was "objectively baseless." In his memoranda, plaintiff does refer generally to "frivolous litigation" by defendants, and identifies the slander suit in particular as "frivolous" and "meritless." Yet the principal focus of his argument and proof has been on defendants' subjective intent in bringing the lawsuits, not on whether they had a basis for bringing them. In fact, so far as the court can determine, plaintiff's only substantive argument, as contrasted with conclusory characterizations, relates to the slander suit, as to which he argues only that "[d]espite their purportedly being 'upset,' none of the Defendants were named on the subject radio program and none of them stated that they had experienced any damages proximately caused by the radio program." However, that lawsuit cannot fairly be said to have been "objectively baseless" solely because plaintiff did not identify any of the defendants by name in the radio talk show. Defendants could reasonably have

taken the position that listeners would have known plaintiff's comments were directed against them notwithstanding that he did not use their names. Moreover, there is obviously no merit to plaintiff's suggestion that defendants' suit was "objectively baseless" because defendants did not allege they had experienced any damages as a proximate result of plaintiff's comments. Plaintiff does not deny that his statements in the talk show were disparaging of the "leadership" at the 186th, and he does not dispute defendants' assertion that they considered that his statements slandered them. In short, plaintiff has not shown that defendants' slander suit against him was "objectively baseless."

Plaintiff has made no effort to show that any other allegedly "frivolous litigation" brought by the moving defendants was objectively baseless, and the evidence before the court shows that it was not. Among the lawsuits which Bryant claims were retaliatory are two separate suits for malicious prosecution brought by defendants Temple and Wilkes stemming from a confrontation between them and Bryant at the Moose Lodge. Following the Moose Lodge incident, Bryant initiated criminal charges for assault and battery against Wilkes and Temple. Those charges were ultimately dismissed, following which Wilkes and Temple sued Bryant for malicious prosecution. Bryant has not and cannot show that those suits were objectively baseless.

Bryant has identified four other allegedly retaliatory lawsuits, brought against him by defendants

Malta, Pierce, Chalk and Wilson for invasion of privacy. The events leading to those lawsuits is not disputed. Following a second investigation by the Air Force Inspector General's (IG) office, Bryant received from the IG's office a letter/summary report of its findings. Although the letter recited that it was protected by the Privacy Act and that Bryant should not disclose it but rather should destroy it or return it, Bryant caused it to be delivered to the *Meridian Star* and the *Clarion Ledger*. The *Meridian Star* published the names of Malta, Wilson, Pierce, Chalk and others and identified allegations that had been substantiated against them. Based on Bryant's alleged disclosure of the IG's report to the media, defendants Pierce, Wison, Chalk and Malta separately sued Bryant for invasion of privacy. One could not reasonably conclude that these lawsuits were objectively baseless.

Because plaintiff has offered no evidence to show that defendants' lawsuits against him were "objectively baseless," defendants are entitled to summary judgment. *See A Fisherman's Best, Inc.*, 310 F.3d at 192 (affirming dismissal where "[the plaintiff] did not present sufficient evidence to show that [the defendant's] attempt to change the City's longlining policy for the Maritime Center was objectively baseless"); *Frosty Bites, Inc. v. Dippin' Dots, Inc.*, No. 3-01-CV-1532-M, 2003 WL 21196247, at 8 (N.D. Tex. 2003) (granting summary judgment on defendant's counterclaim where it failed to bring forth specific evidence to show that the plaintiff had no reasonable ground

for bringing the suit). In the absence of such proof, the court must conclude that defendants had a right to bring those suits and can incur no liability, regardless of their subjective motivation in filing the suits. *See Prof'l Real Estate Investors,* 508 U.S. at 59, 113 S. Ct. 1920, 1928 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.").

In addition to defendants' motion for summary judgment, the parties have sought clarification from the court as to the claims that remain pending, as the parties have different views of this issue. Having reviewed the record and prior rulings, the court would state the following.

First, plaintiff has no pending claim for relief based on his allegation that defendants (or some of them) orchestrated a break-in of his vehicle in Memphis. The record reflects that in connection with defendants' previous summary judgment motion, plaintiff moved for an evidentiary hearing regarding spoliation of evidence and propriety of a negative inference instruction based on an allegation that defendants, or persons acting under their direction, broke into Bryant's truck in May of 2005 while the truck was parked at a Holiday Inn in Memphis and stole his laptop computer and other items pertinent to this case. Defendants advised they would welcome a hearing, so they could prove they were not involved in the break-in. By memorandum opinion and order dated July 17, 2007, the court granted in part and denied in part defendants' motion for summary

judgment, and granted plaintiff's motion for an evidentiary hearing. Thereafter, on July 31, 2007, defendants moved for sanctions against plaintiff's counsel, Paul Koerber, alleging that he lacked any factual basis for representing to the court that defendants and/or their counsel stole Bryant's laptop, used stolen emails or that the emails (admittedly received from an anonymous source) came from Bryant's laptop.

In an order entered following the hearing, the court wrote that it was "simply not persuaded that Bryant has proven that defendants were responsible for the break-in of his truck and theft of his laptop and box of documents." *Bryant v. Mississippi Military Dept.*, No. 3:05CV179TSL-JCS, at 7 (S.D. Miss. March 31, 2008), However, the court further indicated it was "convinced that Bryant and his counsel both genuinely believed that defendants were responsible for the break-in and theft of the items from Bryant's truck," and was not persuaded that they were totally lacking in some factual basis for this belief. *Id.* at 8. Unfortunately, the court failed to also specifically set forth its conclusion that defendants were entitled to summary judgment on this claim because plaintiff could not prove by a preponderance of the evidence that defendants were responsible for the alleged break-in. The court's conclusion that plaintiff was not without *some* factual basis for believing defendants were involved in the break-in was intended only to explain the court's declination to impose sanctions, and was not intended to suggest that plaintiff had produced sufficient evidence to create a genuine issue

of material fact on this claim. The court would now clarify its conclusion that the evidence, viewed in the light most favorable to plaintiff, does not support a finding from a preponderance of the evidence that defendants caused the break-in of Bryant's vehicle.

In his response to defendants' second summary judgment motion and in correspondence to the court, plaintiff states that he still has the following "legal causes of action" against all of the Defendants:

> (a) Whether Defendants conspired to retaliated against the Plaintiff in violation of 42 U.S.C. Sections 1985 and 1986, inasmuch as the Defendants violated the Plaintiff's right of freedom of speech under the First Amendment to the United States Constitution;
>
> (b) Whether Plaintiff's complaints were motivating factors in the Defendants' conduct against the Plaintiff;
>
> (c) Whether the Defendants formed and/or participated in a civil conspiracy to cause harm to the Plaintiff and/or to otherwise violate 42 U.S.C. Sections 1985 and 1986, inasmuch as the Defendants violated the Plaintiff's right of freedom of speech under the First Amendment to the United States Constitution;
>
> (d) Whether Defendants engaged in the intentional infliction of mental and emotional distress upon the Plaintiff;

> (e) Whether Defendants engaged in the negligent infliction of mental and emotional distress upon the Plaintiff;
>
> (f) Whether the Defendants wrongfully and intentionally interfered with Plaintiff's advantageous and contractual relationship with his employer FedEx and with his privilege as a flight pilot and transportation employee; and
>
> (g) Whether the Defendants wrongfully engaged in defaming the Plaintiff by portraying him in a false light.

Plaintiff then declares that "[s]ubsumed within these stated legal theories of recovery," there remain a number of "factual claims" against the defendants, which he proceeds to list for the court.

Among those "factual issues" is plaintiff's allegation that defendants cut the gasoline line to plaintiff's wife's vehicle on March 8, 2004. In that part of its opinion on defendants' previous motion for summary judgment in which the court addressed plaintiff's allegations that defendants committed certain acts of vandalism and malicious mischief, the court failed to include this alleged misdeed in the list of acts of vandalism alleged by plaintiff and as a result, failed through oversight and inadvertence to grant summary judgment on this claim. Defendants did move for summary judgment on this claim, and as with the other acts of vandalism alleged by plaintiff, he has no proof that any defendant was involved in

this alleged incident. Summary judgment will therefore be granted on this claim, as well.

Plaintiff also seeks clarification of the court's ruling, or failure to rule, regarding allegations that one or more of the defendants pilfered his computer bag during a lunch break in a court hearing and took certain items from his computer bag. The court's prior opinions may not have clearly disposed of this claim; however, the court would now make clear its opinion that the evidence adduced by plaintiff is not sufficient to warrant a finding, by a preponderance of the evidence, that the defendants were involved in this incident.

Likewise, the court would also now make clear that, with respect to plaintiff's allegations regarding a second alleged break-in of his vehicle in Meridian, plaintiff has not come forward with evidence that could fairly be regarded as creating a genuine issue of material fact as to the involvement of any defendant in the claimed break-in. Accordingly, summary judgment will be granted on this claim.

In light of the rulings herein, and notwithstanding plaintiff's contrary view of these matters, the court has now dismissed all of plaintiff's claims against all defendants with the exception of his claims against defendant Malta for allegedly having threatened him,[7] and his claims against Pierce for

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[7] Unlike the other defendants, Malta has not moved for summary judgment on any claim. However, the court has

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negligent and/or intentional infliction of emotional distress, defamatory/false light liability and intentional interference with his employment with FedEx.[8]

In conclusion, therefore, in accordance with the foregoing, defendant's second motion for summary judgment is granted, and plaintiff's claim against defendants based on alleged retaliatory litigation is dismissed. Moreover, summary judgment is granted as to plaintiff's claims relating to (1) the break-in of plaintiff's truck in Memphis; (2) the break-in of plaintiff's truck in Meridian; (3) the pilfering and theft of items from plaintiff's computer bag; and (4) alleged vandalism by cutting the gas line to plaintiff's wife's car.

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dismissed the claims against all the individual defendants, including Malta, for actions taken in the course of performing their military duties, under the *Feres* doctrine. This includes claims against Malta based on allegations that Malta ridiculed him and assigned him to a storeroom, and threatened him about signing some paperwork.

[8] In its July 17, 2007 opinion addressing defendants' motion for summary judgment, the court noted that from its review of plaintiff's response, it was clear that "each of these claims is based on his allegation that defendant Pierce sent a letter to the Federal Aviation Administration in an attempt to obtain revocation of plaintiff's pilot license, to invoke the investigative authority of the Transportation Safety Administration of the Department of Homeland Security and to obtain plaintiff's termination from his regular employment with FedEx." The court denied Pierce's motion for summary judgment.

SO ORDERED this 16th day of June, 2008.

/s/ Tom S. Lee
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOE H. BRYANT, JR. — PLAINTIFF

VS. — CIVIL ACTION NO. 3:05CV179TSL-JCS

MISSISSIPPI MILITARY DEPARTMENT, ET AL. — DEFENDANT

MEMORANDUM OPINION AND ORDER

With the exception of defendant Greg Malta, the defendants in this cause, Franklin E. Chalk, Frederick D. Feinstein, Roy A. Graham, Billy Joe Gressett, Donald E. Jones, Langford L. Knight, William F. Parten, Robert E. Pierce, Roger E. Shirley, Charles F. Steed, Aaron K. Wilson and Thomas Temple, have moved for summary judgment.[1] Plaintiff Joe H. Bryant, Jr. has responded in opposition to the motion and the court, having considered the memoranda of authorities, together with attachments, submitted by the parties, concludes that the motion should be granted in part and denied in part, as set forth herein.

Bryant brought this action asserting claims under federal and state law based on allegations that defendants engaged in conduct amounting to threats,

[1] All of these defendants are represented by the same counsel. Malta, an attorney, represents himself.

intimidation and violence against him in retaliation for his having made allegations of misconduct by members (including defendants) of the 186th Refueling Wing of the Mississippi Air National Guard (MSANG). The facts, as drawn from the record and as set forth in one of the court's previous opinions in this cause, are as follows.[2] According to his complaint, Bryant began his military service in 1974, and in 1980, was assigned to duty with the MSANG's 186th Tactical Recon Group, which later became the 186th Refueling Wing, located at Key Field in Meridian, Mississippi. Bryant was eventually assigned to MSANG Headquarters, as its Director of Operations. Bryant alleges that between 1990 and 1998, he "began to observe wrongful actions by superiors in the method and manner in which his fellow airmen were being treated." In an effort "to protect and defend his fellow airmen at the 186th, in their jobs, ranks and assignments, as well as to protect the integrity of the 186th," he "took certain actions," including first addressing his allegations and concerns to his superior officers, and ultimately requesting an investigation by the Inspector General of the Department of the Air Force pursuant to 10 U.S.C. § 1034. The Inspector General ultimately undertook two investigations, in which a number of Bryant's allegations of wrongdoing were substantiated. Bryant's charges and the ensuing investigation

[2] *See Bryant v. Military Dept. of State of Mississippi*, Civil Action No. 3:05CV179TSL-JCS (S.D. Miss. Aug. 25, 2005).

were the subject of regular media coverage in local newspapers, and at one point, Bryant, along with the Inspector General's investigator, appeared on a radio talk show and discussed Bryant's allegations and the investigation. Bryant charged that the leadership was corrupt, and vowed to continue working for a change in leadership.

According to Bryant, as a result of his allegations of wrongdoing against senior Guard officials, he was humiliated, intimidated and harassed by various defendants. He claims, for example, that when he first brought his allegations to the attention of then-Brigadier General of the MSANG, Harold Cross, in October 1998, Cross dismissed his complaint. Thereafter, while he was deployed to Bosnia-Herzegovina during January 1999 through July 1999, Cross "sought Plaintiff's voluntary separation from MSANG," directing that plaintiff sign a letter of resignation (which plaintiff refused), and relieved plaintiff of his duties as Director of Operations; when plaintiff returned from Bosnia, he was not reinstated to his former position as Director of Operations but rather was assigned to the position of an officer junior in grade, lieutenant colonel, was directed to assist an officer junior to him; he was ordered to never report to anyone or perform any duties regarding the Wing's flight operations, even though he was a pilot and a colonel; certain of the defendants composed a career-damaging report in an effort to adversely affect his military record; Cross threatened him with loss of his career; he was assigned to a "storeroom" during a

mandatory drill weekend and was ridiculed by Weaver and others; he was ordered by defendant Malta to sign dismissal paperwork associated with his dismissal from MSANG; and someone (presumably one of the defendants) forged Bryant's signature to an acknowledgment that he would be separated from MSANG. He alleges, moreover, that several items of his personal property were vandalized, shots were fired around his home, anonymous cards and letters were sent to him and to FedEx, his civilian employer, and two of the defendants actually assaulted him.

Based on these allegations, Bryant has asserted federal claims for violations of the Military Whistleblower Protection Act, 10 U.S.C. § 1034, under 42 U.S.C. §§ 1983 for violation of his First Amendment rights, and under §§ 1985 and 1986. He has also advanced state law claims for violation of the Mississippi Whistleblower Protection Statute, Miss. Code Ann. § 25-9-171, *et seq.*, intentional and/or negligent infliction of emotional distress, intentional interference with contract and defamatory/false light liability. Plaintiff demands as relief compensatory and punitive damages, any penalties available under Mississippi Code Annotated § 25-9-171, et seq., prejudgment and post-judgment interest and attorney's fees. In their motion, defendants seek summary judgment on each of plaintiff's claims.

This court previously held that allegations by Bryant against defendants concerning employment-related actions taken by any of the defendants

against him are subject to the *Feres* bar. *See Bryant v. Military Dept. of State of Mississippi*, Civil Action No. 3:05CV179TSL-JCS (S.D. Miss. Aug. 25, 2005). However, inasmuch as the individual defendants had filed no dispositive motion at the time of that opinion, there remained an open question as to whether plaintiff's claims against defendants based on allegations that the individual defendants perpetrated threats and acts of vandalism and violence, and other acts of attempted interference with his civilian employment with FedEx on their own, for their own personal reasons and with no arguable military purpose, were covered by *Feres* or otherwise stated a cognizable claim. Defendants argue in their present motion that the only allegation by Bryant against any of the defendants for acts against him in their military capacities is his charge that defendants Chalk, Knight and Temple gave "assistance and input" to a career-damaging report composed by General Cross. Defendants submit that since this alleged act was done within the course and scope of these defendants' military duties, any claim based on this act is barred by *Feres*.[3] For his part, plaintiff does

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[3] Defendants argue not only that Bryant's claim based on this allegation is barred by *Feres*, but also that he cannot succeed on any such claim inasmuch as he has no proof that defendants had written a career-damaging report. In this vein, Bryant has testified that he heard there was an Officer Performance Review (OPR) in his file, and claims that defendant Greg Malta has admitted there was a "bad" OPR in his file; but plaintiff apparently has never seen this alleged OPR, has not produced any such OPR, and has testified that it was not in his

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not dispute that defendants' conduct toward him while he remained in the Guard and prior to his retirement from military service are barred by the *Feres* doctrine, but he argues that *Feres* does not preclude his claims based on allegations of violence, threats and intimidation perpetrated by defendants against him after he had already been removed from the Guard and retired from military service. Indeed, the remaining claims against defendants for actions taken against him are not barred by *Feres,* and defendants do not claim they are; defendants argue, though, that the remaining claims are subject to dismissal for other reasons.

Bryant has alleged that defendants' actions violated the Military Whistleblower Act, 10 U.S.C. § 1034. This court has previously ruled that plaintiff has no viable claim under that Act for the reason that the statute does not authorize a private cause of action. *See Bryant,* Civil Action No. 3:05CV179TSL-JCS (S.D. Miss. Aug. 25, 2005). Notwithstanding the court's opinion, Bryant argues at one point in his response to defendants' motion that defendants' actions taken in reprisal for his having communicated wrongful conduct to the Inspector General violate 10 U.S.C. § 1034(b)(1) and (2), which is the Military

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final personnel records. Without evidence that such a report exists and as to what it contains, plaintiff would be hard pressed to establish that any of the defendants contributed in any way to such a report.

Whistleblower Protection Act.[4] That Act does not provide a private cause of action, and thus plaintiff has not stated a cognizable claim against defendants under the Act.

Plaintiff has also alleged a claim for violation of the Mississippi Whistleblower Protection Act, Miss. Code Ann. § 25-9-173 *et seq.*[5] Defendants submit that plaintiff cannot prevail on this claim for each of three reasons. First, the Act proscribes reprisal or retaliation by a state "agency," not by one's co-workers, and provides a remedy only against the agency and the individual members of its governing board or authority, or where there is no governing board or authority, the agency's executive director;[6] the Act

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[4] Elsewhere in his response, Bryant states, "Make no mistake, the point of Plaintiff's claims under 10 U.S.C. Section 1034 is not for a private cause of action under that statute; rather, Plaintiff contends [he has a] right to proceed with constitutional claims under the First Amendment and that his speech to the Inspector General are indeed 'protected communication' under the military's own statutory and regulatory guidelines."

[5] Mississippi Code Annotated § 25-9-173 states:

> (1) No agency shall dismiss or otherwise adversely affect the compensation or employment status of any public employee because the public employee testified or provided information to a state investigative body whether or not the testimony or information is provided under oath.

[6] *See* Miss. Code Ann. § 25-9-175 ("An agency which violates [this section] shall be liable to the public employee for back pay and reinstatement. In addition, an employee whose employment

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covers only retaliation or reprisal that adversely affects an employee's compensation or employment status;[7] and the Act affords no protection for actions taken against an employee after he is no longer employed. Defendants argument on these points appear meritorious, and Bryant has not contended otherwise in response to defendants' motion. Accordingly, summary judgment will be granted on this claim.

Plaintiff charges additionally that defendants' retaliatory actions violated his rights under the First Amendment. In their motion, defendants do not challenge Bryant's assertion that his communications to his military superiors and/or to media outlets concerning allegations of improprieties at the 186th constituted protected speech under the First Amendment. They argue, though, not only does *Feres* bar plaintiff's claims for any actions taken by defendants within their military capacities, but that plaintiff cannot succeed on his claim under § 1983 as to all other acts which occurred outside the course and scope of defendants' military duties for he cannot show that defendants acted under color of state law in committing such acts.

A claim for violation of the First Amendment to the United States Constitution must be brought

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is suspended or terminated or who is subject to adverse personnel action . . . is entitled to sue. . . .").

[7] *See* Miss. Code Ann. §25-9-173, *supra*, n.3.

pursuant to 42 U.S.C. § 1983, which requires state action. To state a claim under § 1983, a plaintiff must allege facts showing a person acting under color of state law deprived the plaintiff of a right, privilege or immunity secured by the United States Constitution or the laws of the United States. *See Ellison v. De La Rosa,* 685 F.2d 959, 960 (5th Cir. 1982) (citing *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S. Ct. 1908, 1912-1913 (1981). The Supreme Court has given the following general definition of action taken "under color of state law": "Misuse of power, possessed by virtue of state law and made possible only because the wrong doer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic,* 313 U.S. 299, 326, 61 S. Ct. 1031, 1043 (1941); *see also Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 929, 102 S. Ct. 2750 (1982) (stating that "[t]he actions of a state officer who exceeds the limit of his authority constitute state action for purposes of the Fourteenth Amendment"). "[N]ot every action undertaken by a person who happens to be a state actor is attributable to the state." *Harmon v. Grizzel,* 2005 WL 1106975, 4-5 (S.D. Ohio 2005) (citation omitted). "Section 1983 is generally not implicated unless a state actor's conduct occurs in the course of performing an actual or apparent duty of his office, or unless the conduct is such that the actor could not have behaved as he did without the authority of his office." *Waters v. City of Morristown, Tenn.,* 242 F.3d 353, 359 (6th Cir. 2001) (citations omitted) (citing *West v. Atkins,* 487 U.S. 42, 49-50, 108 S. Ct. 2250 (1988), where the Court stated, "The traditional

definition of acting under color of state law requires that the defendant . . . exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."). In general, "a defendant's private conduct, outside the course or scope of his duties and unaided by any indicia of actual or ostensible state authority, is not conduct occurring under color of state law." *Harmon,* 2005 WL 1106975, at 5 (citations omitted). "[E]valuation of whether particular conduct constitutes action taken under the color of state law, must focus on the actual nature and character of that action." *Schultz v. Wellman,* 717 F.2d 301, 304 (6th Cir. 1983). Here, the nature and context of defendant's alleged acts belies any reasonable conclusion that they acted under color of state law.

As this court noted in its prior opinion, plaintiff had argued that he brought this suit to address actions taken by plaintiff

> by individuals, who just so happen to also be in the military but who act for no military purpose or reason; rather, they act for their own hatred against the plaintiff. Their actions occur off base, have no justifiable military purpose, [and] are perpetrated solely for personal reasons. . . .

It would seem evident that actions taken by individuals who "just so happen to be in the military" but who have acted "off base" solely for their own personal reasons and with no military purpose or reason could not reasonably be found to have been

taken "under color of state law." Apparently recognizing that this characterization of defendants' actions would doom his § 1983 claim, plaintiff's position has shifted somewhat; he now argues that although defendants acted in an "extra-military manner," they nevertheless "act[ed] under color of state authority in perpetrating their retaliation against Bryant" because they "clothe[d] themselves as members of the state militia" and took the challenged actions against Bryant because they "considered him a threat to them, their military careers, their self-righteous honor and even to Key Field itself." However, a state actor does not act "under color of state law" simply because his actions were undertaken in an attempt to protect his position as a state official. Moreover, as plaintiff himself has acknowledged, the specific acts of which he complains, e.g., assaulting plaintiff, making harassing phone calls to plaintiff, vandalizing plaintiff's personal property, firing gun shots around plaintiff's home and trying to get plaintiff fired from his civilian employment with FedEx, were not made possible by defendants' military positions and did not occur in the course of defendants' performing any of their military duties. Their alleged conduct was private conduct, "outside the course or scope of [their] duties and unaided by any indicia of actual or ostensible state authority." *Harmon,* 2005 WL 1106975, at 5. Plaintiff cannot succeed on any claim under § 1983.

Defendants have also argued that plaintiff has not stated a cognizable claim for relief under § 1985,

noting that while there is no requirement of state action under § 1985, a claim under § 1985 "requires proof of a conspiracy 'motivated by racial or some other type of invidious, class-based' distinction." *Lyles v. Lemmon,* 165 Fed. Appx. 305-306, 1 (5th Cir. 2006) (citing *Holdiness v. Stroud,* 808 F.2d 417, 424 (5th Cir. 1987), and *United States v. Armstrong,* 951 F.2d 626, 630 (5th Cir. 1992)). *See Garrie v. James L. Gray, Inc.,* 912 F.2d 808, 813 (5th Cir. 1990) (rejecting argument that "whistleblowers" are a protected class for purposes of § 1985 and dismissing claim for plaintiff's failure to show "some racial or otherwise class-based, invidiously discriminatory animus") (citing *Buschi v. Kirven,* 775 F.2d 1240, 1258 (4th Cir. 1985), and *Pope v. Bond,* 641 F. Supp. 489, 499 (D.D.C. 1986)).

Plaintiff implicitly acknowledges this, but points out that the requirement of class-based animus applies only to claims under § 1985(3), and that his claims are brought under § 1985(1) and (2). Looking to § 1985(2), the first clause of that subsection prohibits a conspiracy to deter a party or witness in a federal court from attending or testifying in court, punishing parties or witnesses for having attended or testified in federal court or influencing or punishing federal jurors; this clause has no applicability here. The second clause of § 1985(2) creates a cause of action against "two or more persons" who "conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any

citizen the equal protection of the laws. . . ." 42 U.S.C. § 1985(2). "Under this clause, like § 1985(3), a plaintiff must demonstrate that there was 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" *Dallas v. Holmes,* 137 Fed. Appx. 746, 753, 2005 WL 1313801, 6 (6th Cir. 2005) (quoting *Kush v. Rutledge,* 460 U.S. 719, 726, 103 S. Ct. 1483 (1983)) (finding no valid claim under § 1985(2) where plaintiff did not allege membership in a protected class and discrimination based on such membership). Plaintiff has no viable claim under § 1985(2).

Section 1985(1) prohibits conspiracies to interfere with a federal officer in the performance of his duties or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof. As this subsection includes no requirement of class-based animus,[8] plaintiff's failure to identify any such

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[8] This court agrees that the Supreme Court's opinion in *Kush v. Rutledge,* 460 U.S. 719, 726, 103 S. Ct. 1483, 1487-88 (1983), "mandates a holding that a cause of action under § 1985(1) does not require an allegation of racial or class-based discriminatory animus." *Wisdom v. Department of Housing and Urban Development,* 713 F.2d 422, 426 (6th Cir. 1983). At issue in *Kush* was whether the first part of § 1985(2) included a requirement of class-based animus. In concluding there was no such requirement, the Court placed primary emphasis on the fact that certain parts of § 1985, namely § 1985(1), the first part of § 1985(2), and the second part of § 1985(3), "contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws,"

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animus is no impediment to the pursuit of this claim.[9] Defendants argue, though, that even assuming for

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whereas the second part of § 1985(2) and the first part of § 1985(3) "contain[ ] language requiring that the conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws." *Kush*, 460 U.S. at 725, 103 S. Ct. at 1487. The Court's reasoning leaves no room for doubt that class-based animus is not a requirement of § 1985(1). *See Pope v. Bond*, 641 F. Supp. 489, 497 (D.D.C. 1986) ("[T]here is no requirement under § 1985(1) that plaintiff allege racial or other class-based, invidiously discriminatory animus.") (citing *Kush); see also Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975, 98 S. Ct. 533 (1977) (pre-*Kush* case holding that § 1985(1) should not be limited solely to cases where racial or group animus is present). *But see Santistevan v. Loveridge*, 732 F.2d 116 (10th Cir. 1984) (stating that "[a] viable § 1985(1) cause of action requires allegations of class-based or racial discriminatory animus"); *Burson v. State of Nev., Dept. of Human Resources, Welfare Div.*, 1994 WL 681051, *2 (9th Cir. 1994) (finding conspiracy claims under § 1985(1) were correctly dismissed where plaintiff "failed to allege a class-based or racial discriminatory animus required under § 1985(1) and (3).")

[9] Although a few cases have suggested that § 1985(1) is limited to *external* disruption of a federal official's performance of his job duties and thus exempts federal officials from liability, the majority view appears to be that the section is not so limited. The court in *Spagnola v. Mathis* observed,

> In light of the Supreme Court's mandate in *Griffin* and significant case law in the lower federal courts, we cannot so limit the section. Citing *Griffin*, the District Court in *Stith v. Barnwell*, 447 F. Supp. 970, 973-74 (M.D.N.C. 1978), stated unequivocally that "§ 1985(1) would apply where defendants who were acting as federal employees were participating in a conspiracy otherwise proscribed by the subsection." Similarly, in *Mollnow v. Carlton*, 716 F.2d 627, 631 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100, 104 S. Ct.

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the sake of argument that plaintiff has pled a viable claim under this section, he still has not shown that defendants engaged in any conduct that would be cognizable under those provisions.[10]

For his part, plaintiff submits that it was his affirmative duty as a member of the Air Force to bring misconduct to the attention of the appropriate authority, and that it was on account of his efforts in this regard that defendants undertook their retaliatory actions, and even went so far as to form an

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1595 (1984), the Ninth Circuit noted that "§ 1985(1) is legislation specifically authorizing suit by injured federal officers [against their superiors]," but found that suit under the section was precluded for military subordinates. In *Windsor v. The Tennessean*, 719 F.2d 155 (6th Cir. 1983), the Sixth Circuit held that the plaintiff stated a cause of action under § 1985(1) against a group of defendants, one of whom was his supervisor in the federal government. In *Lawrence v. Acree*, 665 F.2d 1319 (D.C. Cir. 1981), this circuit assumed for purposes of deciding an official immunity claim that a § 1985(1) action would ordinarily lie against federal officials, though it did not rule on that issue. Finally, in *Perry v. Golub*, 400 F. Supp. 409 (N.D. Ala. 1975), the District Court found that there was a substantial likelihood that the plaintiff would prevail on the merits of one of three claims, one of which was a § 1985(1) claim against his superiors in the federal government.

809 F.2d 16, 29 (D.C. Cir. 1986).

[10] Defendant has also alleged a cause of action under 42 U.S.C. § 1986, which imposes liability on those who know of conspiracies as described in § 1985 and who have the power to prevent the conspirators from acting but who fail to do so.

association, calling themselves the "Concerned Guardsmen of Mississippi," for the unmitigated purpose of going after him and both attempting to shut him up and to punish him for his public comments about the 186th.

In his complaint and throughout discovery, plaintiff has identified specific acts which he claims were committed by defendants in retaliation for his whistleblowing activities. Among other things, plaintiff has claimed that someone, probably one or more of the defendants, cut the tires on his personal airplane; shot the window of his motor home; fired shots around his home; scratched his son's car; made harassing phone calls to his home; mailed harassing cards to his home;[11] and wrote anonymous letters to his employer FedEx.[12] In their motion, defendants

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[11] This incident involved a greeting card that was sent to Bryant's home anonymously congratulating him on having an illegitimate child. Bryant testified that the greeting card was one he had bought and had put in his computer bag. He believes that either Wilkes, Temple or Pierce must have stolen the card out of his computer bag during a lunch break in court proceedings in other litigation between some of the defendants and Bryant, and that the same person or persons must have also gotten on his computer and found documentation relating to his having ordered a DNA kit for purposes of determining parentage, and that this person or persons must have then written the card and mailed it to his home. Plaintiff has admitted that there were others in the courtroom, and that he was not aware whether any of the defendants remained in the courtroom for any part of the lunch break.

[12] Anonymous letters were mailed to plaintiff's employer, FedEx, in which it was alleged that Bryant had killed some

(Continued on following page)

argue that to the extent any of plaintiff's claims are based on these incidents, summary judgment is in order because plaintiff has no evidence to connect any of the defendants to these acts; rather, he has only speculated that defendants had some involvement in these incidents. Defendants point to testimony by plaintiff in which he admitted he did not know who committed these acts;[13] they submit that plaintiff's "feeling" or speculation that defendants were involved in these events is unsupported by any actual facts and is insufficient to withstand summary judgment. *See Ward v. N.L.R.B.*, 462 F.2d 8, 13 (5th Cir. 1972) ("Obviously conjecture and speculation cannot substitute for proof.").

Plaintiff does not need direct evidence to establish defendants' involvement in these acts and could rely on circumstantial evidence to create a triable issue. Evidently that is his plan, for in response to defendants' motion, plaintiff has not

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parrots, had sexual relations with a 12-year old girl, had smuggled machine guns on a FedEx plane and had purloined pre-employment test to help his friends pass the test and get hired by FedEx. According to plaintiff, FedEx investigated these allegations and eventually determined they were false. Defendants have denied they sent the letters.

[13] In other litigation, plaintiff testified that he felt there had been retaliation against him by "the same parties under investigation – the same parties who have sued me," i.e., defendants, and stated, "[T]here's unexplained multiple activities that have occurred by I don't know who, but none of it ever occurred before all of the Guard stuff and I personally feel it's Guard related."

offered any direct evidence tending to show that any of the defendants were involved in any of these incidents.[14] Rather, he has only argued that defendants had a motive to engage in such conduct. However, in support of their motion, defendants submitted evidence that the negative publicity generated by Bryant's charges of corruption had angered a number of people in the 186th, and in the Meridian area in general, so that defendants were, as they put it, "not the only people with a strong motive to dislike" him. For his part, Bryant does not deny this; instead, he simply states that he believes defendants had a stronger motive than most to dislike him. In the court's opinion, this is not a sufficient showing to withstand summary judgment. Plaintiff has failed to create a genuine issue of material fact on any of his putative causes of action based on the referenced allegations.

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[14] Plaintiff has essentially ignored defendants' argument on this point altogether, and wholly fails to acknowledge his burden, in response to defendants' motion, to come forward with evidence to substantiate his allegations. Instead, he simply declares that his complaint "is replete with specific factual allegations of the violence, threats and intimidation perpetrated by the individual defendants." This is not a sufficient response. *See Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002) ("Once the moving party has shown 'that there is an absence of evidence to support the non-moving party's cause,' the non-movant must come forward with 'specific facts' showing a genuine factual issue for trial." (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548 (1986)).

In addition to these allegations, plaintiff has identified a certain lawsuit brought by defendants against him for slander as another example of action taken by defendants in retaliation for plaintiff's discharge of his duties and to prevent him from further discharging his duty to report misconduct to appropriate authorities. Specifically, Bryant notes that on June 3, 2003, defendants, with the exception of Temple and Wilkes, filed a lawsuit against him in the Circuit Court of Lauderdale County, claiming that they had been slandered by statements made by Bryant during a May 24, 2003 radio talk show, in which he said, among other things:

> There are some disgusting officers . . . in leadership positions. There's about 10 to 12 more people that need to be admonished. [T]here's more [than] 60 or 100 charges against . . . 10 to 15 people [yet to come] . . . The entire leadership structure is corrupt. I'm after the chief NCOs and the lieutenant colonels and above that have got blood on their hands in this action. All I want is leadership change. I'm not going to stop until . . . we've had a leadership change . . . I'm going to be relentless . . . General Lipscomb and General Cross . . . [are] examples of failed leadership. We have allowed a mafia-type system to grow in the leadership.

According to defendants, the court dismissed the lawsuit on the basis that Bryant had not specifically

named any of the defendants in the radio talk show.[15] Defendants argue that as a matter of law, even if they had a retaliatory motive for filing the lawsuit, plaintiff still cannot state a claim based on defendants' lawsuit against him because "(1) neither the federal nor the state whistleblower statutes provides a legal remedy, and (2) even if they did, the filing of a meritorious suit is not an actionable act of retaliation." While the court has already determined that plaintiff has no actionable claim under either whistleblower statute, but defendants' argument on the first point does not account for plaintiff's claims under §§ 1985(1) and 1986.

Defendants' further argument that the suit cannot provide the basis for an actionable claim is drawn from *Bill Johnson's Restaurants v. NLRB*, in which the Supreme Court held that in light of the First Amendment right of access to the courts, "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the [National Labor Relations] Act." 461 U.S. 731, 742-743, 103 S. Ct.

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[15] The court's order of dismissal which is included as an exhibit does not state a basis for dismissal, but rather recites that the court had conducted a hearing and at the hearing had ruled that the claims would be dismissed, and then gave the plaintiffs (defendants herein) the opportunity to file an amended complaint within 30 days. When the plaintiffs failed to amend, an order was entered dismissing the case with prejudice.

2161, 2170 (1983). Defendants' argument in this regard would have this court assume that defendants' slander suit against Bryant was meritorious, or at least that they had a reasonable basis for bringing the action. Yet they merely declare that they "understandably were upset that Bryant had made slanderous and disparaging statements about them," and argue that they could reasonably have thought they had a viable cause of action notwithstanding that Bryant did not identify them by name in the radio broadcast. However, a party cannot succeed on a claim for slander merely because he was upset by disparaging comments; rather, a meritorious cause of action for slander requires proof, *inter alia,* that the disparaging statements were false. *See Speed v. Scott,* 787 So. 2d 626, 631 (Miss. 2001) (cause of action for slander requires proof of "(a) a false statement that has the capacity to injure the plaintiff's reputation; (b) an unprivileged publication, i.e., communication to a third party; (c) negligence or greater fault on part of publisher; and (d) 'either actionability of statement irrespective of special harm or existence of special harm caused by publication.'") (citation omitted). Bryant has maintained all along, and continues to maintain that his allegations were absolutely true. Thus, even if defendants are correct that their motive in bringing the action against plaintiff is essentially irrelevant, this court cannot conclude as a matter of law that defendants' claim against Bryant for slander was meritorious or well-founded. Defendants have not sustained their burden to demonstrate that summary judgment is proper as to this allegation.

Plaintiff charges in his complaint that he was "met by armed MSANG airmen when he attempted to attend a Minority Awareness Council Meeting" on March 3, 2001. Defendants have presented evidence that the meeting in question was a dinner that was open to members of the public who purchased tickets; that plaintiff did, in fact, attend the dinner in question; and that while there were armed guards present for the occasion, they were there to provide security for a visiting three-star general, who was the dinner speaker. Defendants maintain and have presented evidence that the guards were not there to intimidate plaintiff or to attempt to prevent him from attending the dinner; and plaintiff has pointed to no evidence to the contrary. Accordingly, any claim based on the incident is subject to dismissal.

Plaintiff has asserted a claim against defendants Temple and Wilkes for an assault and battery allegedly committed by these defendants on September 3, 2003. Defendants seek summary judgment as to this claim on the basis that the one-year statute of limitations had run when this suit was filed on March 17, 2005. *See* Miss. Code Ann. § 15-1-35 ("All actions for assault and battery . . . shall be commenced within one (1) year next after the cause of action accrued, and not after."). Plaintiff suggests that because the assault and battery was part of a pattern of threats, harassment and intimidation which was of a continuing nature, his claim for assault and battery is timely. Irrespective of whether evidence of the alleged assault and battery would be

relevant in connection with plaintiff's remaining claim for conspiracy under § 1985 and 1986, his cause of action for assault and battery is plainly untimely; the assault and battery is not itself a continuing tort. Accordingly, the claim for assault and battery will be dismissed.

Bryant has asserted causes of action for intentional and negligent infliction of emotional distress, defamatory/false light liability and intentional interference with his employment with FedEx. His response to defendants' motion makes clear that each of these claims is based on his allegation that defendant Pierce sent a letter to the Federal Aviation Administration in an attempt to obtain revocation of plaintiff's pilot license, to invoke the investigative authority of the Transportation Safety Administration of the Department of Homeland Security and to obtain plaintiff's termination from his regular employment with FedEx. The letter in question was dated November 11, 2004, and stated:

> Mr. Bryant also has a questionable mental background. During a recent AFOSI (Air Force Office of Special Investigation) inquiry an FAA medical examiner, Dr. Edward Caruth, attested to the suspicion that Mr. Bryant suffered paranoia, anxiety and possible schizophrenia.

According to plaintiff, Pierce's representation that Dr. Carruth had questioned his fitness for flight was unfounded, so that when Dr. Carruth learned of the letter, he demanded a retraction from Pierce.

Defendants argue that summary judgment is in order on plaintiff's claim for intentional interference with contract because plaintiff cannot establish that Pierce had no justifiable cause or lawful reason to write the letter or that plaintiff suffered damages resulting from Pierce's having written the letter. *See Grice v. FedEx Ground Pkg. System, Inc.*, 925 So. 2d 907, 910 (Miss. Ct. App. 2006) (elements of intentional interference with contract are "(1) intentional and willful acts, (2) calculated to cause damage to the plaintiff in his lawful business, (3) done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) resulting in actual damage or loss") (citations omitted).

Defendants submit that in writing the letter, Pierce was merely reporting a safety concern to the agency with jurisdiction over the issue, which he had a right and duty to do, and that under Mississippi law, the rule against interference with contracts "does not apply where one interferes with another's contract in the legitimate exercise of one's own right." *Southwest Drug Co. v. Howard Bros. Pharmacy of Jackson, Inc.*, 320 So. 2d 776, 778 (Miss. 1975) *See also Federal Aviation Regulation 13.1* (providing that "any person who knows of a violation of the Federal Aviation Act of 1958 . . . or any other rule, regulation or order issued thereunder, should report it to [the] FAA"). They claim, as well, that "[t]he same right or duty that Pierce had to write the FAA also merits

summary judgment on Bryant's claim for the intentional and/or negligent infliction of emotional distress."

The facts concerning Pierce's motivation and whether he was justified in writing the letter are obviously in dispute; and in the court's opinion, particularly in light of evidence that Pierce may have misrepresented or "shaded" the facts in his letter to the FAA, the issue of whether Pierce had a justifiable reason for contacting the FAA is best reserved for trial.

Defendants submit as an alternative basis for dismissal of Bryant's intentional interference claim that he cannot prove an essential element of his claim, damages, because he did not lose his job or suffer any loss of income as a result of Pierce's letter. *See Levens v. Campbell,* 733 So. 2d 753, 761 (Miss. 1999) ("An action for tortious interference with contract ordinarily lies when [the interference] caus[es] one party not to perform and resulting in injury to the other contracting party."). Plaintiff maintains in response to defendants' motion that, in fact, there is evidence that he suffered damages, and specifically, evidence that he has lost the economic opportunity for advancement with FedEx, as a result of Pierce's letter, which in turn led to the loss of money in his job. He claims he lost one trip worth $1,200, but that the greatest impact has been on his career with FedEx and the lost opportunity for advancement to wide-body jets, which would increase his income by approximately $60,000 annually. The

parties disagree as to the reason Bryant lost the trip that would have earned him $1,200, and also as to the reason he has been unable to advance to wide-body jets. In the court's opinion, plaintiff has presented sufficient evidence to withstand summary judgment on this claim.

A final charge by plaintiff, and one that is the subject of a separate motion by plaintiff for an evidentiary hearing regarding spoliation of evidence and propriety of a negative inference instruction, is that defendants, or persons acting under their direction, broke into Bryant's truck in May of 2005 while the truck was parked at a Holiday Inn in Memphis and stole his laptop computer and other items pertinent to this case. Bryant declares that, "[a]mazingly, during Bryant's deposition on January 11, 2005, in Pierce's ill-fated lawsuit against the United States Air Force, documents from Bryant's stolen computer were presented by Pierce's counsel," and that those same documents "have now likewise been submitted by the Defendants in support of the present motion." Defendants assert this is "another baseless allegation with no proof," yet they state they welcome a hearing to prove the true facts, which are that they were not involved in the break-in and that plaintiff's counsel was specifically informed by Bryant and his lawyers over a year ago that the materials identified by plaintiff came anonymously in the mail. At plaintiff's request, and defendants' acquiescence, the court will set a hearing on plaintiff's motion and will deny summary judgment

to defendants at this juncture as to claims based on this allegation.

Based on the foregoing, it is ordered that defendants' motion is granted in part and denied in part, as set forth herein.

SO ORDERED this 17th day of July, 2007.

/s/ Tom S. Lee
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOE H. BRYANT, JR. — PLAINTIFF

VS. — CIVIL ACTION NO. 3:05CV179LN

THE MISSISSIPPI AIR NATIONAL GUARD, FRANKLIN E. CHALK, FREDERICK D. FEINSTEIN, ROY A. GRAHAM, BILLY JOE GRESSETT, DONALD E. JONES, LANGFORD L. KNIGHT, F. GREGORY MALTA, WILLIAM F. PARTEN, ROBERT E. PIERCE, ROGER E. SHIRLEY, CHARLES F. STEED, AARON K. WILSON AND THOMAS TEMPLE; AND JOHN DOES 1-20 — DEFENDANTS

CORRECTED
MEMORANDUM OPINION AND ORDER

Defendant Mississippi Air National Guard (MSANG) has filed in this case a motion to dismiss pursuant to Rule 12(b)(1), 12(b)(6) and 12(c) and on the basis of the Eleventh Amendment, and for judgment on the pleadings, and has filed a separate motion for dismissal, sanctions and related relief pursuant to Rule 11, 28 U.S.C. § 1927 and Mississippi's Litigation Accountability Act, Miss. Code Ann. § 11-55-1 *et seq.* All of the individual defendants have

joined in MSANG's motion.[1] Plaintiff Joe H. Bryant has responded in opposition to MSANG's motions and the court, having now considered the parties' memoranda of authorities, concludes that MSANG's motion is due to be granted, but the motions of the individual defendants must be denied.

According to the complaint in this cause, Bryant began his military service in 1974, and in 1980, was assigned to duty with MSANG's 186th Tactial Recon Group, which later became the 186th Refueling wing, located at Key Field in Meridian, Mississippi. He eventually was assigned to MSANG Headquarters, as its Director of Operations. Bryant states that between 1990 and 1998, he "began to observe wrongful actions by superiors in the method and manner in which his fellow airmen were being treated."[2] He alleges that in

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[1] Thomas Temple filed his joinder on April 14th, followed by Langford L. Knight, F. Gregory Malta, William F. Parten, Roger E. Shirley, Charles F. Steed, Aaron K. Wilson, Franklin E. Chalk, Frederick D. Feinstein, Roy A. Graham, Billy Joe Gressett and Donald E. Jones, who filed their joinders on April 15th, and Robert Pierce, who filed a motion or joinder on April 19th.

[2] This allegedly included, but was not limited to, racial discrimination; sexual harassment; failure to accomplish required training and falsification of training and certification records; use of government property for non-military purposes; misappropriation of government property; dereliction of officers' duties; wrongful conduct unbecoming of certain officers; falsification of work hour and duty records; wrongful operation of a retail liquor store at Key Field; misreporting of the unit's military readiness status; false and misleading information provided in response to U.S. Congressional inquiries concerning activities

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an effort "to protect and defend his fellow airmen at the 186th, in their jobs, ranks and assignments, as well as to protect the integrity of the 186th," he "took certain actions," including first addressing his allegations and concerns to superior officers, and ultimately to requesting an investigation by the Inspector General of the Department of the Air Force pursuant to 10 U.S.C. § 1034.

According to Bryant, as a result of his allegations of wrongdoing against senior Guard officials, he was humiliated, intimidated and harassed by various defendants. He claims, for example, that when he first brought his allegations to the attention of then-Brigadier General of the MSANG, Harold Cross, in October 1988, Cross dismissed his complaint. Thereafter, while Bryant was deployed to Bosnia-Herzegovina during January 1999 through July 1999, Cross "sought Plaintiff's voluntary separation from MSANG," directing that plaintiff sign a letter of resignation (which plaintiff refused), and relieved plaintiff of his duties as Director of Operations; when plaintiff returned from Bosnia, he was not reinstated to his former position as Director of Operations but rather was assigned to the position of an officer junior

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associated with the base; improper conduct associated with official professional military education course work; improper and inaccurate officer performance reports; impropriety in the use of the 186th's personnel, time, equipment, property and resources for private/personal unofficial activities; and unauthorized retention and/or selection of disqualified and/or unqualified personnel in certain positions.

in grade, lieutenant colonel, was directed to assist an officer junior to him, and was directed to "occupy" an office that was actually in a storage room; he was ordered to never report to anyone or perform any duties regarding the Wing's flight operations, even though he was a pilot and a colonel; certain of the defendants composed a career-damaging report in an effort to adversely affect his military record; Cross threatened him with loss of his career; Walker threatened him with dismissal from MSANG; he was assigned to a "storeroom" during a mandatory drill weekend and was ridiculed by Weaver and others; he was ordered by defendant Malta to sign dismissal paperwork associated with his dismissal from MSANG; and someone (presumably one of the defendants) forged Bryant's signature to an acknowledgment that he would be separated from MSANG.

Plaintiff alleges that after initiation of the Inspector General's investigation, and as a result of the ensuing investigation, defendants engaged in threats, violence and other intimidation tactics, in reprisal for his having communicated wrongful conduct to the Inspector General. He claims, for example, that he was met by armed MSANG airmen when he attempted to attend a Minority Awareness Council Meeting; repeated gun shots were fired in and around his residence; harassing telephone calls and anonymous hang-up calls were made to him; defendant Temple physically assaulted him; in a scheme to cause him to lose his civilian job with Federal Express, defendant Pierce attempted to get his pilot's

license revoked by the FAA by falsifying medical information concerning plaintiff; the gasoline line to plaintiff's wife's vehicle was cut; the windows to his motor-home were shot out and appliances attached to the motor-home were destroyed; and the tires on his personal airplane were slashed.

Based on these allegations, Bryant has alleged claims for violations of the Military Whistleblower Protection Act, 10 U.S.C. § 1034, the Mississippi Whistleblower Protection Statute, Miss. Code Ann. § 25-9-171, *et seq.*, and the First Amendment, and asserts claims under 42 U.S.C. §§ 1983, 1985 and 1986. He demands as relief compensatory and punitive damages, any penalties available under Mississippi Code Annotated § 25-9-171, *et seq.*, prejudgment and post-judgment interest and attorney's fees.[3]

The resolution of MSANG's motion is rather straightforward. First, plaintiff's claim that MSANG violated the Military Whistleblower Protection Act, 10 U.S.C. § 1034, is due to be dismissed because that Act affords plaintiff no private cause of action. The Act, which prohibits any person from taking any unfavorable personnel action or withholding a favorable personnel action "as a reprisal against a member of the armed forces for making or preparing a

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[3] The court notes that while MSANG submits that Bryant has also sought equitable relief in the form of reinstatement, in light of his plea for "[a]ll relief and remedies . . . afforded [him] in accordance with . . . § 25-9-191 *et seq.*, plaintiff makes clear in his response memorandum that he does not seek reinstatement.

communication to a Member of Congress or an Inspector General," 10 U.S.C. § 1034(b), provides only an administrative remedy and not a private cause of action. *See Acquisto v. U.S.*, 70 F.3d 1010, 1011 (8th Cir. 1995) (concluding, upon review of the statutory language, legislative history and administrative regulations, that "§ 1034 does not provide [a service member] with any private cause of action, express or implied"); *Soeken v. U.S.*, 47 Fed. Cl. 430, 433 (Fed. Cl. 2000) ("[T]he Military Whistleblower Protection Act provides solely an administrative process for handling complaints of improper retaliatory personnel actions" and does not provide a private cause of action).[4] Accordingly, plaintiff has no viable claim in

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[4] The Act establishes a comprehensive administrative scheme for review of reprisal complaints. *Acquisto v. U.S.*, 70 F.3d 1010, 1011 (8th Cir. 1995). It provides for corrective action by the Board for Correction of Military Records, the Secretary of the respective services, and the Secretary of the Defense, and states that "[u]pon the completion of all administrative review . . . , the member or former member of the armed forces . . . who made the allegation . . . , if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense . . . [who] shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned. . . ." The applicable Operating Procedures in turn provide that the 'decision of the Secretary of Defense is final," and the decision whether to uphold or reverse the decision of the Secretary of the military unit involved lies in the Secretary of Defense's "sole discretion." *See* 32 C.F.R. 98a.

this court against any defendant for any alleged violation of § 1034.[5]

Further, inasmuch as MSANG, for present purposes, is a state agency, *all* of plaintiff's remaining claims against MSANG are barred by the Eleventh Amendment.[6] The Eleventh Amendment bars an

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[5] Although plaintiff did clearly plead a claim for violation of the Military Whistleblower Protection Act in his complaint as a basis for relief, plaintiff obviously now recognizes that this is not a cognizable claim, for he argues in his response brief that

> the point of [his] claim under 10 U.S.C. Section 1034 is not for a private cause of action under that statute; rather, [he] contends his right to proceed with constitutional claims under the *First Amendment* and that his speech to the Inspector General are indeed "protected communication" under the military's own statutory and regulatory guidelines.

[6] "In each state the National Guard is a state agency, under state authority and control. At the same time, federal law accounts, to a significant extent, for the composition and function of the Guard. Accordingly, the Guard may serve the state in times of civil strife within its borders while also being available for federal service during national emergencies." *Knutson v. Wisconsin Air Nat. Guard,* 995 F.2d 765, 767 (7th Cir. 1993). Because of the hybrid nature of the Guard, questions may arise as to whether the actions of the Guard and/or individual defendants were under color of state or federal law. Here, the parties appear to agree, and the facts substantiate that MSANG is a state agency as to the matters at issue. *Cf. Knutson,* 995 F.2d at 768 (concluding that service member's challenge to his termination by Guard presented "the rather straightforward case of state officers exercising their state authority to effectuate the termination of state militia personnel," and observing, "No one is claiming that the Guard had been called into service by the federal government at the time of the termination. Moreover, WIANG is a part of the Wisconsin militia, with the

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action in federal court by a citizen of a state against his own state, including a state agency, unless the state has waived its immunity or Congress has validly abrogated the state's immunity. *See Martinez v. Texas Dept. of Criminal Justice,* 300 F.3d 567, 573 (5th Cir. 2002). Neither exception applies to any of the claims involved here.

While Bryant suggests that the Mississippi Whistleblower Protection Statute represents a waiver of the state's Eleventh Amendment immunity, the text of the statute belies his position. Specifically, the statute requires that suits under the Act be brought in the circuit courts of Mississippi. *See* Miss. Code Ann. § 25-9-177. In *Martinez, supra,* the Fifth Circuit explained that "[e]ven when a State consents to suit in its own courts, . . . it may retain Eleventh Amendment immunity from suit in federal court," that "[a] State's consent to being sued in federal court must 'be unequivocally expressed'," and that "for a state statute to waive Eleventh Amendment immunity, 'it must specify the State's intent to subject itself to suit in federal court'." 300 F.3d at 575. Thus in *Martinez,* where the Texas Whistleblower Act contained a waiver of sovereign immunity and specified that the aggrieved employee could sue in a state district court, the Fifth Circuit found there was no waiver of the

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governor serving as commander-in-chief. The Adjutant General, an appointee of the governor, effected the termination of Knutson. Slack's actions, administered at the state level, are therefore under color of state law.").

state's Eleventh Amendment immunity: "In other words, the Act waives state sovereign immunity only in Texas state courts." *Id.* The same conclusion pertains here.

Moreover, there has been no Congressional abrogation of state sovereign immunity as to claims under § 1983, 1985 or 1985. *See Quern v. Jordan,* 440 U.S. 332, 338-40, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); *Edelman v. Jordan,* 415 U.S. 651, 677, 94 S. Ct, 1347, 39 L. Ed. 2d 662 (1974); *Seibert v. University of Oklahoma Health Sciences Center,* 867 F.2d 591 (10th Cir. 1989), *abrogated on other grounds, Federal Lands Legal Consortium ex rel. Robart Estate v. U.S.,* 195 F.3d 1190, 1195 (10th Cir. 1999) (seeing "no reason why the Supreme Court's reasoning and holding (in *Quern,* and *Edelman*) should not apply with equal force to plaintiff's civil rights claims under section 1985 (conspiracy) and section 1986 (failure to prevent conspiracy violations)"); *Smith v. Johnson,* 2005 WL 578470, *4 (N.D. Tex. 2005) (claims under §§ 1983, 1985 and 19895 barred by Eleventh Amendment).[7]

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[7] It follows that inasmuch as plaintiff is seeking only monetary damages and does not appear to be seeking any form of equitable relief, his claims against any of the defendant officials in their official capacity as state officers would be barred by the Eleventh Amendment. That is to say, the *Ex Parte Young* exception to Eleventh Immunity for prospective injunctive relief against state officials in their official capacity is inapplicable.

In addition, Bryant's claims under §§ 1983, 1985 and 1986 are barred for the further reason that these statutes create rights solely against "persons" and a state is not considered a "person" under these statutes, *See Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) ("[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983").[8]

If these reasons were not sufficient to mandate dismissal of plaintiff's claims against MSANG, those claims would be barred for additional reasons. In *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), the Supreme Court held that when it enacted the Federal Tort Claims Act, Congress did not intend for the FTCA's remedies to apply to a person who sustained an injury incident to military service, even if that injury would otherwise be actionable under the FTCA. Thus, the Court held that soldiers could not recover under the FTCA for injuries that "ar[ose] out of or were in the course of activity incident to service." 340 U.S. at 146, 71 S. Ct. at 159. Subsequently, in *Chappell v. Wallace,* 462 U.S. 296, 304, 103 S. Ct. 2362, 2367, 76 L. Ed. 2d 586 (1983),

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[8] Again, because Bryant has sued only for monetary relief, his claims under these statutes against state officials in their official capacity are not against "persons." *Cf. Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'").

the plaintiffs, military personnel, brought a *Bivens* action seeking redress against their superior officers for discrimination in duty assignments and performance evaluations. The Court held that in keeping with *Feres,* "it would be inappropriate to provide enlisted military personnel with a *Bivens-type* remedy against their superior officers," reasoning that

> [t]he special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.

*Id.*, 103 S. Ct. at 2367. The Court's holding was applied and extended in subsequent cases. *See United States v. Shearer,* 473 U.S. 52, 58, 105 S. Ct. 3039, 3042, 87 L. Ed. 2d 38 (1985) (dismissing claim against Army for negligent supervision by mother of a serviceman who was murdered by another serviceman on the basis that allowing the claim to proceed would involve the courts in military management, evaluating "basic choices about discipline, supervision, and control of a serviceman"); *United States v. Stanley,* 483 U.S. 669, 684, 107 S. Ct. 3054, 3064, 97 L. Ed. 2d 550 (1987) (dismissing claims of former servicemen against Army for experimental administration of LSD on him while in military, reasoning that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service'"). The rationale for barring such *Bivens* actions

was extended by the Fifth Circuit to § 1983 and § 1985 claims brought by members of the Texas National Guard in *Crawford v. Texas Army National Guard,* 794 F.2d 1034, 1036 (5th Cir. 1986). The court there reasoned,

> Section 1983 and due process claims, like those predicated on *Bivens,* invite judicial second-guessing of military actions and tend to overlap the remedial structure created within each service, which, according to *Chappell,* provide an exclusive remedy subject to review only under the arbitrary and capricious standard.

*Id.*

Nnotable here with respect to MSANG's position that Bryant's claims are barred by the *Feres* doctrine is the fact that while MSANG has broadly argued that all Bryant's claims *against it* are subject to *Fere,* its argument proceeds from the premise that all of Bryant's claims *against it* are related exclusively to employment/personnel issues, such as demeaning grade, work and space assignments, an alleged career-damaging evaluation and his "forced retirement." Indeed, MSANG's initial brief contained no specific acknowledgment of plaintiff's factual allegations of intentional threats, vandalism and violence to which he claims he was subjected by "defendants," but

rather focused solely on the military nature of the alleged "personnel decisions" concerning Bryant.[9]

Conversely, in his response to the motion, Bryant has himself sidestepped MSANG's arguments as to the military character of the referenced employment-related allegations of the complaint,[10] and focused instead entirely on his allegations of intentional threats, vandalism and violence by the individual defendants, which he submits were committed "by individuals, who just so happen to also be in the military but who act for no military purpose or reason

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[9] In that initial memorandum, MSANG argued, "The core of COL Bryant's Complaint is that he suffered numerous adverse military personnel actions. . . ."; "military personnel decisions are nonjusticiable in civilian fora"; "COL Bryant complains that the Guard supposedly took numerous adverse military personnel actions against him. . . ."; COL Bryant's claims . . . clearly revolve around internal military personnel decisions"; "COL Bryant complains that the Guard took numerous adverse military personnel actions against him-all impacting his military career. . . . Nowhere in that brief does MSANG directly argue that cutting the gas line on Bryant's wife's car, or slashing the tires on his personal plane, or falsifying medical records in an effort to cause him to lose his civilian job with Federal Express or any other myriad allegations of similar wrongdoing qualifies as a "personnel decision" or occurring "incident to military service."

[10] He also completely ignores MSANG's argument that it is not a "person" for purposes of Bryant's civil rights claims, and its claim of entitlement to Eleventh Amendment immunity, and thus has in effect confessed *MSANG's* motion.

[but] rather . . . for their own hatred against the Plaintiff."[11]

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[11] Bryant argues, for example,

> [T]he harm being perpetrated by the Defendants against the Plaintiff is in his civilian capacity, as specifically alleged in the Complaint. . . . The factual allegations, taken as true, specifically point to Plaintiff's harm suffered outside the confines of the military. . . . Indeed, no where in the Defendants' argument do they justify their actions against the Plaintiff in his employment with FedEx, at his residence, at a meeting of minority awareness counsel members, with respect to gunshots being fired at his place of residence, harassing phone calls, and the like, as more specifically set forth herein. . . .
>
> [T]his case does not seek to have this Court overrule military decisions, but it is rather brought in order to have this Court address the above violence and continuing acts of threats and intimidation against the Plaintiff by individuals, who just so happen to also be in the military but who act for no military purpose or reason; rather, they act for their own hatred against the Plaintiff. Their actions occur off-base, have no justifiable military purpose, are perpetrated strictly for personal reasons, and are replete with vengeance against the Plaintiff for his having reported the Defendants' misdeeds, while he was in the military. . . .
>
> [T]he point of this suit does not touch upon inherently military or internal decisions concerning a serviceman's military duty; rather, the Complaint points to specific allegations of unmitigated violence, threats and intimidation against the Plaintiff.
>
> [A]ll of [defendants'] analysis begs the question of whether the actions of violence, threats, intimidation and harm specifically alleged in the Plaintiff's

(Continued on following page)

In the court's opinion, it cannot reasonably be questioned that Bryant's allegations against MSANG (and for that matter, against all the defendants) relating to his employment are subject to the *Feres* bar. Bryant, in fact, does not actually contend otherwise.

Whether Bryant's claims based on his remaining allegations of misdeeds by "defendants" would be covered by *Feres* and its progeny is another matter, however. In the court's opinion, in light of plaintiff's contention that the individual defendants perpetrated these alleged threats and acts of vandalism and violence, and other acts of attempted interference with his civilian employment with FedEx on their own, for their own personal reasons and with no arguable military purpose, it follows that MSANG can have no liability of any sort based on such alleged wrongful acts. *See Sheridan v. United States,* 487 U.S. 392, 401 (1988) ("The tortious conduct of an

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Complaint have anything to do with "internal military decisions." [T]he Defendants have not even argued or stated frankly to this Court how repeated gun shots, harassing telephone calls, physical assault and battery, the filing of frivolous law suits, the falsification of medical information to the FAA, the interference with Plaintiff's employment with FedEx, the issuance of false and defamatory statements, invoking the investigative authority of the TSA, the cutting of the gasoline line on Plaintiff's vehicle, the shooting out of windows to Plaintiff's motor home, and the slashing of tires on Plaintiff's airplane, have anything whatsoever to do with military functions.

off-duty serviceman, not acting within the course and scope of his office or employment, does not in itself give rise to Government liability whether the conduct is intentional or merely negligent.").[12]

On the other hand, given that none of the individual defendants has undertaken to address Bryant's arguments pertaining to these allegations, this court cannot conclude that the dismissal of Bryant's civil rights claims against these individual defendants is in order at this time.

Based on the foregoing, therefore, it is ordered that MSANG's motion to dismiss is granted, as are the motions of the individual named defendants in their official capacities. It is further ordered that the motions of the remaining defendants in their individual capacities are denied as set forth herein.

SO ORDERED this 26th day of August, 2005.

/s/ Tom S. Lee
UNITED STATES
DISTRICT JUDGE

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[12] The court notes that MSANG has moved for sanctions pursuant to Rule 11, 28 U.S.C. § 1927 and the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 *et seq.*, for plaintiff's filing of an alleged frivolous action against MSANG. While the court has concluded that MSANG is entitled to be dismissed from the action, the court is not persuaded that Bryant's complaint against MSANG was frivolous. Accordingly, this motion will be denied.

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

---

No. 09-60182

---

JOE H. BRYANT, JR.,

Plaintiff-Appellant-
Cross-Appellee

v.

MILITARY DEPARTMENT OF
THE STATE OF MISSISSIPPI,

Defendant-Appellee-
Cross-Appellant

FRANKLIN E. CHALK; FREDERICK D.
FEINSTEIN; ROY A. GRAHAM;
BILLY JOE GRESSETT; DONALD E. JONES;
LANGFORD L. KNIGHT; F. GREGORY MALTA;
WILLIAM F. PARTEN; ROBERT E. PIERCE;
ROGER E. SHIRLEY; CHARLES F. STEED;
AARON K WILSON; THOMAS TEMPLE;
JOHN DOES 1-20; LESLIE WILKES,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Mississippi

---

**ON PETITION FOR REHEARING**

(Filed Mar. 12, 2010)

Before JONES, Chief Judge, and GARZA and STEWART, Circuit Judges.

PER CURIAM:

We have considered all of the arguments in the petition and find rehearing unwarranted. Further, having failed to urge any argument or even cite *Chalk v. Bertholf,* 980 So. 2d 290 (Miss. Ct. App. 2007) (en banc) in any pleading before the district court or this court, Bryant has waived any argument based on that case. IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
EMILIO M. GARZA
UNITED STATES
CIRCUIT JUDGE

**United States Constitution Amendment I. Religious and political freedom.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

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**10 U.S.C. § 1034. Protected communications; prohibition of retaliatory personnel actions**

(a) Restricting Communications With Members of Congress and Inspector General Prohibited – (1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.

(2) Paragraph (1) does not apply to a communication that is unlawful.

(b) Prohibition of Retaliatory Personnel Actions – (1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing –

(A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted; or

(B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to –

(i) a Member of Congress;

(ii) an Inspector General (as defined in subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978;

(iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;

(iv) any person or organization in the chain of command; or

(v) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications.

(2) Any action prohibited by paragraph (1) (including the threat to take any unfavorable action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

(c) Inspector General Investigation of Allegations of Prohibited Personnel Actions – (1) If a member of the armed forces submits to an Inspector General an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall take the action required under paragraph (3).

(2) A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

(A) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination.

(B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(3)(A) An Inspector General receiving an allegation as described in paragraph (1) shall expeditiously determine, in accordance with regulations prescribed under subsection (h), whether there is sufficient evidence to warrant an investigation of the allegation.

(B) If the Inspector General receiving such an allegation is an Inspector General within a military department, that Inspector General shall promptly notify the Inspector General of the Department of Defense of the allegation. Such notification shall be made in accordance with regulations prescribed under subsection (h).

(C) If an allegation under paragraph (1) is submitted to an Inspector General within a military department and if the determination of that Inspector General under subparagraph (A) is that there is not sufficient evidence to warrant an investigation of the allegation, that Inspector General shall forward the matter to the Inspector General of the Department of Defense for review.

(D) Upon determining that an investigation of an allegation under paragraph (1) is warranted, the Inspector General making the determination shall expeditiously investigate the allegation. In the case of a determination made by the Inspector General of the Department of Defense, that Inspector General may delegate responsibility for the investigation to an

appropriate Inspector General within a military department.

(E) In the case of an investigation under subparagraph (D) within the Department of Defense, the results of the investigation shall be determined by, or approved by, the Inspector General of the Department of Defense (regardless of whether the investigation itself is conducted by the Inspector General of the Department of Defense or by an Inspector General within a military department).

(4) Neither an initial determination under paragraph (3)(A) nor an investigation under paragraph (3)(D) is required in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.

(5) The Inspector General of the Department of Defense, or the Inspector General of the Department of Homeland Security (in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy), shall ensure that the Inspector General conducting the investigation of an allegation under this subsection is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.

(6) Inspector General Investigation of Underlying Allegations – Upon receiving an allegation under subsection (c), the Inspector General receiving the allegation shall conduct a separate investigation

of the information that the member making the allegation believes constitutes evidence of wrongdoing (as described in subparagraph (A) or (B) of subsection (c)(2)) if there previously has not been such an investigation or if the Inspector General determines that the original investigation was biased or otherwise inadequate. In the case of an allegation received by the Inspector General of the Department of Defense, the Inspector General may delegate that responsibility to the Inspector General of the armed force concerned.

(e) Reports on Investigations – (1) After completion of an investigation under subsection (c) or (d) or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(3)(E), the Inspector General conducting the investigation shall submit a report on the results of the investigation to the Secretary of Defense (or to the Secretary of Homeland Security in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and shall transmit a copy of the report on the results of the investigation to the member of the armed forces who made the allegation investigated. The report shall be transmitted to the Secretary, and the copy of the report shall be transmitted to the member, not later than 30 days after the completion of the investigation or, in the case of an investigation under subsection (c) by an Inspector General within a

military department, after approval of the report of that investigation under subsection (c)(3)(E).

(2) In the copy of the report transmitted to the member, the Inspector General shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under section 552 of title 5. However, the copy need not include summaries of interviews conducted, nor any document acquired, during the course of the investigation. Such items shall be transmitted to the member, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is transmitted to the member.

(3) If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (1) within 180 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense (or to the Secretary of Homeland Security in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and to the member making the allegation a notice –

(A) of that determination (including the reasons why the report may not be submitted within that time); and

(B) of the time when the report will be submitted.

(4) The report on the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.

(f) Correction of Records When Prohibited Action Taken – (1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.

(2) In resolving an application described in paragraph (1), a correction board –

(A) shall review the report of the Inspector General submitted under subsection (e)(1);

(B) may request the Inspector General to gather further evidence; and

(C) may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.

(3) If the board elects to hold an administrative hearing, the member or former member who filed the application described in paragraph (1) –

(A) may be provided with representation by a judge advocate if –

(i) the Inspector General, in the report under subsection (e)(1), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);

(ii) the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires judge advocate assistance to ensure proper presentation of the legal issues in the case; and

(iii) the member is not represented by outside counsel chosen by the member; and

(B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (e)(1).

(4) The Secretary concerned shall issue a final decision with respect to an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former

member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.

(5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).

(6) If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.

(g) Review by Secretary of Defense – Upon the completion of all administrative review under subsection (f), the member or former member of the armed forces (except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

(h) Regulations – The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service

in the Navy, shall prescribe regulations to carry out this section.

(i) Definitions – In this section:

(1) The term "Member of Congress" includes any Delegate or Resident Commissioner to Congress.

(2) The term "Inspector General" means any of the following:

(A) The Inspector General of the Department of Defense.

(B) The Inspector General of the Department of Homeland Security, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy.

(C) Any officer of the armed forces or employee of the Department of Defense who is assigned or detailed to serve as an Inspector General at any level in the Department of Defense.

(3) The term "unlawful discrimination" means discrimination on the basis of race, color, religion, sex, or national origin.

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**42 U.S.C. § 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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**42 U.S.C. § 1985. Conspiracy to interfere with civil rights**

(1) Preventing officer from performing duties – If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an

officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror – If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges – If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either

directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

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**42 U.S.C. § 1986. Action for neglect to prevent**

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the

commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

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No. 10-81

SUPREME COURT, U.S.
AUG 12 2010

In The
# Supreme Court of the United States

JOE H. BRYANT, JR.,

*Petitioner,*

v.

MILITARY DEPARTMENT OF THE STATE OF MISSISSIPPI, BY AND THROUGH THE MISSISSIPPI AIR NATIONAL GUARD, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION OF MISSISSIPPI AIR NATIONAL GUARD TO PETITION FOR WRIT OF CERTIORARI

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August 12, 2010

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## QUESTIONS PRESENTED

1. Whether Petitioner's failure to raise issues found dispositive below precludes the grant of certiorari by this Court.

2. Whether Petitioner's failure to brief the sole issue listed with respect to this Respondent precludes the grant of certiorari by this Court.

3. Whether Petitioner fails to present an issue, based on the record and decision below, worthy of consideration by this Court.

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*Bryant v. Military Dep't of Miss.*, 597 F.3d 678 (5th Cir. 2010). Pet. App., p. 1-29. In Petitioner's appeal of the trial court orders dismissing all claims against all Defendants, save Defendants F. Gregory Malta and Robert E. Pierce, the Fifth Circuit "AFFIRM[ED] the district court's dismissal of all claims against the MSANG and the individual Appellees in their official capacities and its two separate grants of summary judgment in the Individual Appellee's favor. On cross-appeal, we AFFIRM the district court's sanctions decision" denying MSANG's motion for sanctions against Petitioner COL (ret.) Bryant. Pet. App., p. 29.

*Bryant v. Military Dept. of State of Miss. ex rel. Miss. Air Nat'l Guard*, 381 F.Supp.2d 586 (S.D. Miss. Aug. 26, 2005). Pet. App., p. 74-89. In its "Corrected Memorandum Opinion and Order,"[1] the district court

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[1] *Bryant v. Military Dept. of State of Miss. ex rel. Miss. Air Nat'l Guard* (unpublished) No. 3:05cv179-TSL-AGN (August 15, 2005) (United States District Court for the Southern District of Mississippi, Jackson Division). This original opinion is not only unpublished, but was stricken from the district court docket and replaced with the August 26, 2005 Corrected Memorandum Opinion and Order. The original district court memorandum opinion and order dismissed all Petitioner COL (ret.) Bryant's claims against Respondent MSANG, as well as all official capacity claims against the individual Respondents.

There is no substantive difference between the district court's August 26, 2005 Corrected Memorandum Opinion and Order and the original August 15, 2005 Memorandum Opinion and Order. Rather, the August 26, 2005 version merely deleted a

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"ordered that MSANG's motion to dismiss is granted, as are the motions of the individual named defendants in their official capacities. It is further ordered that the motions of the remaining defendants in their individual capacities are denied as set forth herein." Pet. App., p. 89.

## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 20, 2010.

## STATEMENT OF THE CASE

This suit concerns military-related personnel claims brought by a retired Mississippi Air National Guard ("MSANG") officer. Petitioner COL (ret.)[2] Bryant's original Complaint pled a myriad of allegedly wrongful acts by the MSANG, and thirteen of its current or retired Guardsmen.

The core of Petitioner COL (ret.) Bryant's Complaint is that he suffered numerous adverse military

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stray reference to "defendant Cross[ ]" on page 3 of the original opinion – which was an inadvertent error, as Cross has never been a defendant in this suit.

[2] "COL (ret.)" means Retired Colonel.

personnel actions, including forced retirement, all supposedly in retaliation for reporting perceived military wrongdoing to military authorities, including the Active Component Inspector General of the Air Force. Pet. App., p. 3. Petitioner COL (ret.) Bryant's original Complaint[3] asserted six causes of action against Respondent MSANG: (1) the Military Whistleblower Protection Act, 10 U.S.C. § 1034; (2) a claim under the First Amendment; (3) 42 U.S.C. § 1983; (4) 42 U.S.C. § 1985; (5) 42 U.S.C. § 1986; and (6) the Mississippi Whistleblower Protection Act, Miss. Code Ann. §§ 25-9-171 through 25-9-177 (1972). Pet. App., p. 2.

Respondent MSANG[4] refers to the Fifth Circuit and district court's descriptions of further relevant

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[3] The district court dismissed all claims against MSANG before Petitioner COL (ret.) Bryant was granted leave to amend his Complaint as to his claims against the individual Defendants.

[4] Petitioner COL (ret.) Bryant's Complaint names as an entity Defendant the "Military Department of the State of Mississippi, by and through the Mississippi Air National Guard." However, there is no such entity. The Mississippi Military Department and the Mississippi Air National Guard are two separate and distinct state entities. *Compare* Miss. Code. Ann. § 33-3-3 (1972) (Mississippi Military Department) *with* Miss. Code Ann. § 33-1-1 (1972) (MSANG) *and* Miss. Code Ann. § 33-1-1(c) (1972) (MSNG). Looking to the substance of COL (ret.) Bryant's claims, it is clear that he is intending to proceed against the MSANG, as the allegations he pled all relate to supposed incidents relating to his military service in the Guard, and he does not allege that he or any of the individual Defendants are or have been employees of the Mississippi Military Department, a state executive agency. Accordingly, both the Guard and the

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facts. Pet. App., p. 1-5 & 74-78.[5] Notably, with respect to Respondent MSANG, the Fifth Circuit found:

> [Petitioner COL (ret.)] Bryant asserts that the district court erred in dismissing his claims against MSANG under the *Feres* doctrine. His brief, however, substantively discusses the *Feres*[6] issue only in relation to his vandalism and violence claims against the Individual Appellees. The district court clearly held that *Feres* was not a ground for disposing of the vandalism claims and only applied *Feres* to Bryant's claims of employment-related retaliation against MSANG and the Individual Appellees. *Bryant v. Military Dep't of State of Miss.*, 381 F.Supp.2d 586, 594 (S.D. Miss. 2005) ("*Bryant I*"). Accordingly, the limited *Feres* discussion in Bryant's brief centers around the wrong claims and the wrong parties. Bryant's failure to adequately brief the *Feres* issue is a waiver of these claims. *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001). Bryant did not preserve the issue merely by mentioning it in the "Statement of Issues." *See, e.g., Justiss Oil Co. v. Kerr-McGee Ref. Corp.*, 75 F.3d 1057, 1067 (5th Cir. 1996) (declining to address the merits of an issue

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district court have treated the MSANG as the intended Party-Defendant, without objection from COL (ret.) Bryant.

[5] For the convenience of the Court, a Wire Diagram reflecting the relationship of the various military entities and persons at issue herein is included at App. 1.

[6] *Feres v. United States*, 340 U.S. 135 (1950).

> raised only in the Statement of Issues and not argued in the body of the brief). Accordingly, we decline to address the propriety of the district court's dismissal under *Feres*.
>
> Moreover, the decision below stands on independent grounds. The district court ruled that all of Bryant's claims against MSANG are barred by the Eleventh Amendment and that the §§ 1983, 1985, and 1986 claims are barred because MSANG is not a "person" under those statutes. Bryant failed to argue that either of those determinations was incorrect. His failure to do so is fatal to his appeal of MSANG's dismissal from this litigation. *See, e.g., Berry v. Jefferson Parish,* 326 Fed.Appx. 748, 750 (5th Cir. 2009) (unpublished) ("An unbriefed argument is an unpreserved argument."); *see also* Fed. R.App. P. 28(a)(9)(A).

*Bryant v. Military Dep't of Miss.*, 597 F.3d 678, 684-85 (5th Cir. 2010), Pet. App., p. 6-7.

## SUMMARY OF THE ARGUMENT

Certiorari should be denied for three reasons.

First, Sup. Ct. R. 14 provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Petitioner sets forth only one question presented as to this Respondent, "[w]hether the District Court and Fifth

Circuit erred in dismissing claims against the Military Department of the State of Mississippi . . . due to a misapplication of the *Feres* doctrine. . . ."[7] Pet., p. i.

Petitioner failed to list the Eleventh Amendment and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) bases for this Respondent's dismissal at all in his Questions Presented – meaning that even a reversal of the *Feres* ground would not change the outcome of the case as to this Respondent. Further, he also completely ignored the Fifth Circuit's finding that he waived the *Feres*, *Will* and Eleventh Amendment issues on appeal, a finding he has not challenged in his Petition.

Second, although Petitioner formally listed the *Feres* issue in his Questions Presented, his Petition fails to brief that issue *as to this Respondent* at all. Petitioner's abject failure to explain the basis for the grant of certiorari on *Feres* grounds as to this Respondent therefore waives the issue.

Third and finally, even if Petitioner had not waived any review of the *Feres*, Eleventh Amendment and *Will* grounds for this Respondent's dismissal

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[7] Servicemembers may not assert claims against the military, their superiors or other servicemembers "where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950); *U.S. v. Stanley*, 483 U.S. 669, 683-84 (1987); *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983).

below, there is no circuit split or other ground justifying the grant of certiorari in this case on those issues.

## ARGUMENT AND AUTHORITIES

### I. PETITIONER'S VIOLATION OF SUP. CT. R. 14 THROUGH HIS FAILURE TO LIST THE ELEVENTH AMENDMENT, *WILL* AND WAIVER GROUNDS DISPOSITIVE IN FAVOR OF THIS RESPONDENT BELOW IS FATAL TO HIS PETITION.

Petitioner sets forth only one question presented as to this Respondent, "[w]hether the District Court and Fifth Circuit erred in dismissing claims against the Military Department of the State of Mississippi . . . due to a misapplication of the *Feres* doctrine. . . . " App. Pet., p. i.

While the *Feres* doctrine[8] was one basis for the dismissal of all Petitioner's claims against this Respondent, Pet. App., p. 6-7, 83-85, the Fifth Circuit also affirmed the district court's dismissal of all Bryant's claims against this Respondent on the basis of Eleventh Amendment immunity, as well as the fact that Respondent is not a "person" subject to liability under 42 U.S.C. §§ 1983 & 1985, under this Court's

[8] *See supra* n. 7.

holding in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Pet. App., p. 6-7, 80-83.

Additionally, the Fifth Circuit held that Bryant waived his right to appeal the judgment in this Respondent's favor, due to "Bryant's failure to adequately brief the *Feres*[, Eleventh Amendment and *Will*] issue[s]. . . ." App., p. 6-7.

Sup. Ct. R. 14 provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Petitioner failed to list the Eleventh Amendment and *Will* bases for this Respondent's dismissal at all – meaning that even a reversal of the *Feres* ground – the sole issue on which Petitioner seeks certiorari as to this Respondent – would not change the outcome of the case as to this Respondent. *See Yee v. Escondido*, 503 U.S. 519, 535 (1992) (internal quotation marks and alteration omitted) ("[U]nder this Court's Rule 14.1(a), only questions set forth in the petition, or fairly included therein, will be considered by the Court"); *Wood v. Allen*, ___ U.S. ___, 130 S.Ct. 841, 851 (Jan. 20, 2010) (internal quotation marks and brackets omitted) ("[T]he fact that petitioner discussed [an] issue in the text of his petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review").

As Petitioner failed to raise the Eleventh Amendment and *Will* dispositive grounds for judgment in Respondent's favor, they are barred from review. *See*

*Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 279-80 (1993) ("The 'hindrance'-clause issue is not fairly included within the questions on which petitioners sought certiorari, *see* Pet. for Cert. i; this Court's Rule 14.1(a), which is alone enough to exclude it from our consideration"). Accordingly, as with the waiver issue on which Respondent prevailed below, the grant of certiorari on *Feres* grounds would therefore be necessarily futile. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 (1976) ("Although the parties each devoted a portion of their briefs to the waiver issue, that issue was not raised in the petition for certiorari. Since we consider '(o)nly the questions set forth in the petition or fairly comprised therein,' this Court's Rule 23.1(c), we have no occasion to pass on the correctness of the decisions below on the waiver question").

## II. PETITIONER'S FAILURE TO BRIEF EITHER THE *FERES*, ELEVENTH AMENDMENT OR *WILL* GROUNDS FOR THIS RESPONDENT'S DISMISSAL IS FATAL TO HIS PETITION.

Although Petitioner formally listed the *Feres* issue in his Questions Presented, his Petition fails to brief that issue as to this Respondent *at all*. Rather, all of Petitioner's arguments are directed solely at his claims against *the individual Respondents*, not the MSANG.

Petitioner made the same fatal error before the Fifth Circuit:

> Accordingly, the limited *Feres* discussion in Bryant's brief centers around the wrong claims and the wrong parties. Bryant's failure to adequately brief the *Feres* issue is a waiver of these claims. *United States v. Martinez,* 263 F.3d 436, 438 (5th Cir. 2001). Bryant did not preserve the issue merely by mentioning it in the "Statement of Issues." *See, e.g., Justiss Oil Co. v. Kerr-McGee Ref. Corp.,* 75 F.3d 1057, 1067 (5th Cir. 1996) (declining to address the merits of an issue raised only in the Statement of Issues and not argued in the body of the brief). Accordingly, we decline to address the propriety of the district court's dismissal under *Feres.*
>
> Moreover, the decision below stands on independent grounds. The district court ruled that all of Bryant's claims against MSANG are barred by the Eleventh Amendment and that the §§ 1983, 1985, and 1986 claims are barred because MSANG is not a "person" under those statutes. Bryant failed to argue that either of those determinations was incorrect. His failure to do so is fatal to his appeal of MSANG's dismissal from this litigation. *See, e.g., Berry v. Jefferson Parish,* 326 Fed.Appx. 748, 750 (5th Cir. 2009) (unpublished) ("An unbriefed argument is an unpreserved argument."); *see also* Fed. R.App. P. 28(a)(9)(A).

*Bryant v. Military Dep't of Miss.*, 597 F.3d 678, 684-85 (5th Cir. 2010), Pet. App., p. 6-7. Petitioner's abject failure to explain the basis for the grant of certiorari on *Feres* grounds as to this Respondent thus waives the issue.

## III. THERE IS NO CIRCUIT SPLIT OR OTHER JUSTIFICATION FOR A GRANT OF CERTIORARI.

Even if Petitioner had not waived any review of the *Feres*, Eleventh Amendment and *Will* grounds for this Respondent's dismissal below, there is no circuit split or other ground justifying the grant of certiorari in this case.

Every circuit to have considered the issue has found *Feres* applicable to claims brought by National Guardsmen such as this one. *E.g.*, *Walch v. Adjutant General's Dept. of Tex.*, 533 F.3d 289, 302 (5th Cir. 2008); *Wright v. Park*, 5 F.3d 586, 588 (1st Cir. 1993); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 (7th Cir. 1993), *cert. denied*, 510 U.S. 933 (1993); *Wood v. United States*, 968 F.2d 738, 740 (8th Cir. 1992); *Farmer v. Mabus*, 940 F.2d 921, 923-25 (5th Cir. 1991); *Lovell v. Heng*, 890 F.2d 63, 65 (8th Cir. 1989); *Watson v. Arkansas Air Nat'l Guard*, 886 F.2d 1004, 1011 (8th Cir. 1989); *Costner v. Oklahoma Army Nat'l Guard*, 833 F.2d 905, 907 (10th Cir. 1987); *Holdiness v. Stroud*, 808 F.2d 417, 426 (5th Cir. 1987); *Crawford v. Texas Army Nat'l Guard*, 794 F.2d 1034,

1036 (5th Cir. 1986); *NeSmith v. Fulton*, 615 F.2d 196, 203 (5th Cir. 1980).

Similarly, no circuit court of appeals has denied any state's National Guard Eleventh Amendment immunity in the context of civil rights claims of this nature. *E.g.*, *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1493 (10th Cir. 1983); *accord Jones v. New York State Div. of Military Affairs*, 166 F.3d 45, 49 (2d Cir. 1999) (holding that both the New York Military Department and National Guard are state entities entitled to Eleventh Amendment immunity); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 n. 3 (7th Cir. 1993), *cert. denied*, 510 U.S. 933 (1993) (Eleventh Amendment bars claims against Guard); *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1493 (10th Cir. 1983) (Kansas National Guard "[i]s not independent of the State of Kansas; rather, it is an arm of the state and entitled to any immunity which the state possesses"); *Hefrich v. Pennsylvania Dept. of Military Affairs*, 660 F.2d 88, 90 (3rd Cir. 1981) (military department immune under Eleventh Amendment); *Henry v. Textron, Inc.*, 577 F.2d 1163, 1164 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978) (Virginia Guard immune under Eleventh Amendment).

Finally, the fact that a state agency like Respondent MSANG[9] is not a "person" subject to

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[9] Under 10 U.S.C. § 101(c)(2), the Mississippi National Guard is one of the "[o]rganized militia of the several States . . . [;]" *see Perpich v. DOD*, 496 U.S. 334, 350-51 (1990) (recognizing that the militias are state entities); *see also Maryland ex*

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potential liability under 42 U.S.C. §§ 1983 & 1985, was conclusively established over twenty years ago by *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).

As this Court observed in *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 536 (1992):

> Rule 14.1(a) assists the Court in selecting the cases in which certiorari will be granted. Last Term alone we received over 5,000 petitions for certiorari, but we have the capacity to decide only a small fraction of these cases on the merits. To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions.

*Id.* Respondent respectfully submits there is no "particularly important question[]" in this suit. The petition for writ of certiorari should be denied.

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*rel. Levin v. United States*, 381 U.S. 41, 48 (1965), *vacated on other grounds*, 382 U.S. 159 (1965) (citation omitted) ("[a]ll located decisions . . . hold that National Guardsmen of the several states are employees of the state except when in the actual service of the United States").

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied. Respondent also requests attorney's fees and costs, including double costs, for Petitioner's filing of a frivolous petition under Supreme Court Rules 42(2) and 43(7).

Respectfully submitted,

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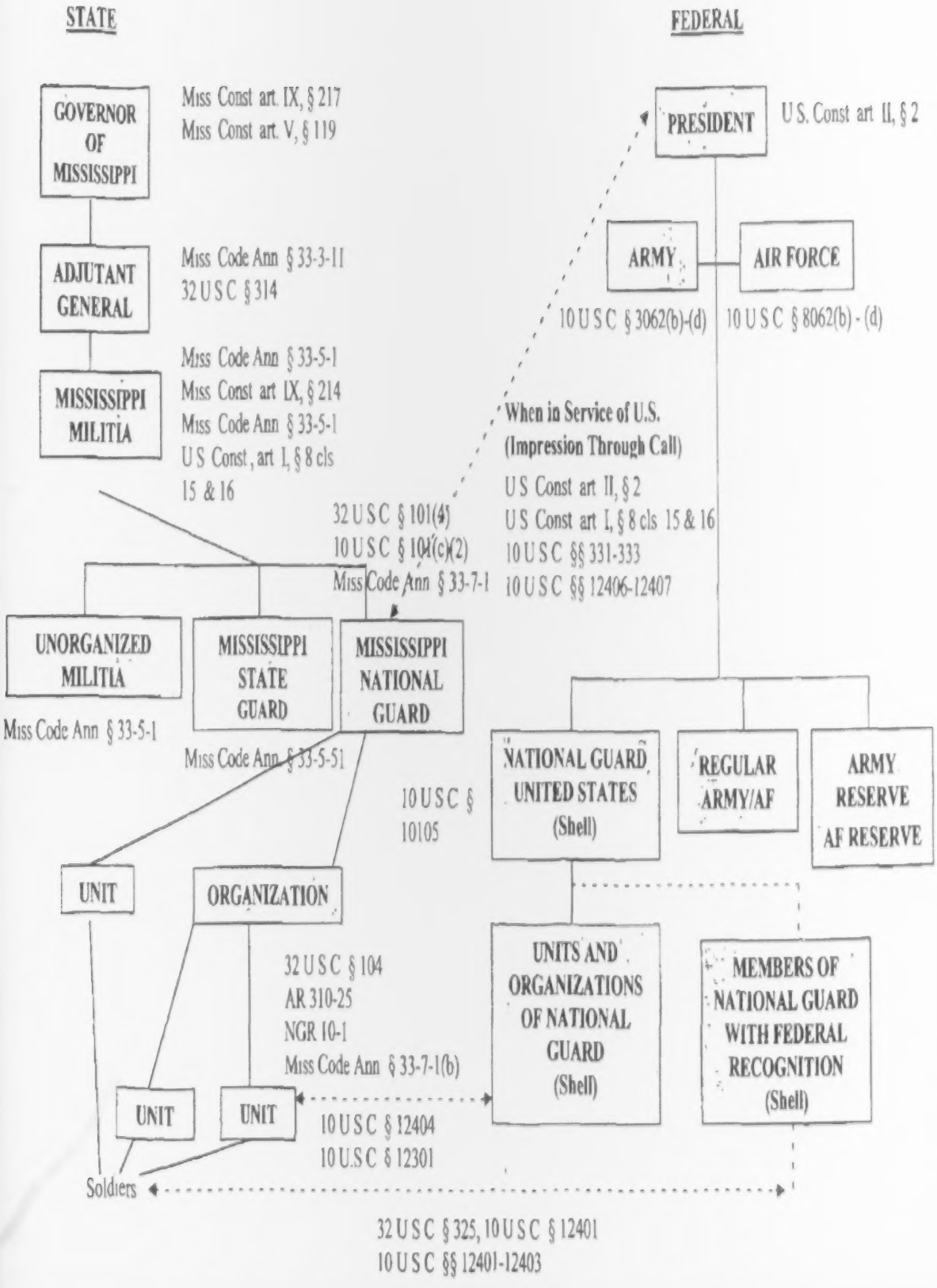
August 12, 2010 **Counsel of Record*


STATE
FEDERAL
GOVERNOR OF MISSISSIPPI
Miss Const art. IX, § 217
Miss Const art. V, § 119
ADJUTANT GENERAL
Miss Code Ann § 33-3-11
32 U S C § 314
MISSISSIPPI MILITIA
Miss Code Ann § 33-5-1
Miss Const art IX, § 214
Miss Code Ann § 33-5-1
U S Const, art I, § 8 cls 15 & 16
PRESIDENT
U S. Const art II, § 2
ARMY
AIR FORCE
10 U S C § 3062(b)-(d)
10 U S C § 8062(b) - (d)
When in Service of U.S. (Impression Through Call)
U S Const art II, § 2
U S Const art I, § 8 cls 15 & 16
10 U S C §§ 331-333
10 U S C §§ 12406-12407
32 U S C § 101(4)
10 U S C § 101(c)(2)
Miss Code Ann § 33-7-1
UNORGANIZED MILITIA
Miss Code Ann § 33-5-1
MISSISSIPPI STATE GUARD
MISSISSIPPI NATIONAL GUARD
Miss Code Ann § 33-5-51
10 U S C § 10105
NATIONAL GUARD UNITED STATES (Shell)
REGULAR ARMY/AF
ARMY RESERVE AF RESERVE
UNIT
ORGANIZATION
32 U S C § 104
AR 310-25
NGR 10-1
Miss Code Ann § 33-7-1(b)
UNITS AND ORGANIZATIONS OF NATIONAL GUARD (Shell)
MEMBERS OF NATIONAL GUARD WITH FEDERAL RECOGNITION (Shell)
UNIT
UNIT
10 U S C § 12404
10 U.S.C § 12301
Soldiers
32 U S C § 325, 10 U S C § 12401
10 U S C §§ 12401-12403